Supreme Court, U.S.
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No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC.,
a Nevada corporation and DANIEL BISHOP
Petitioners,
vs.
CITY OF HENDERSON, a Nevada Municipal corporation,
JAMES GOFF, CHIEF OF POLICE OF THE CITY OF
HENDERSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a city violate the First and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional *zoning ordinance* because the bookstore obtained its *business license* by deception?

2. Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtained its business license by deception?

3. To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?

4. Do this Court's decisions in the *criminal* cases of *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969), *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966); and *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938), apply to civil cases involving constitutional challenges to invalid ordinances which violate the First and Fourteenth Amendments (free speech)?

PARTIES TO PROCEEDING

Nevada Entertainment Industries, Inc. is a Nevada corporation. There is no parent company and there is no subsidiary.

Daniel Bishop is an officer of Nevada Entertainment Industries, Inc.

The City of Henderson is a Nevada municipality. James Goff is its Police Chief.

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OPINIONS BELOW

The decision of the United States District Court for the District of Nevada was signed on November 25, 1992 by the Honorable Lloyd D. George, United States District Judge and entered on November 27, 1992. The decision was not reported or published. It is Appendix 1 to this Petition.

The initial decision of the Court of Appeals was published as *Nevada Entertainment Industries v. City of Henderson,* 8

F.d 3d 1348 (9th Cir. 1993), but was withdrawn by an order published at 21 F.3d 895 (1994).

On May 4, 1994, the United States Court of Appeals for the Ninth Circuit filed its new decision in this case. It did so by a Memorandum that was not published. A copy of the Court of Appeals' unpublished Memorandum Decision filed May 4, 1994 is Appendix 2. The order denying rehearing filed July 11, 1994 is Appendix 3.

During the course of these proceedings there have been related orders made by this Court in response to Petitions filed by the City of Henderson which challenged federal jurisdiction on abstention grounds. None of these orders is directly related to the instant Petition. While the instant case was still pending in the District Court, the City of Henderson sought a Writ of Mandate from the Court of Appeals, which was denied. This Court denied a Writ of Certiorari in *City of Henderson v. United States District Court*, U.S. ____, 112 S.Ct. 60 (1991) and also denied a Petition for Rehearing, ____ U.S. ____, 112 S.Ct. 622 (1992). This case bore docket number 90-1771.

Later, the City of Henderson challenged the refusal by the United States Court of Appeals for the Ninth Circuit to allow an interlocutory appeal, This Court denied relief. See *City of Henderson v. United States District Court*, ____ U.S. ____, 113 S.Ct. 657 (1992). This case bore docket number 92-643.

Still later, the City of Henderson filed a Petition for Writ of Mandamus with this Court to challenge the order of the United States Court of Appeals for the Ninth Circuit withdrawing its prior opinion in this matter. See *City of Henderson v. Nevada Entertainment Industries*, No. 93-1969. This Court denied the Petition on October 3, 1994.

JURISDICTION

Petitioners are seeking review of the unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed May 4, 1994. Appendix 2.

On July 11, 1994, the United States Court of Appeal for the Ninth Circuit denied the Petition for Rehearing filed by Petitioners Nevada Entertainment Industries and Daniel Bishop. Appendix 3.

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1257 because Petitioners are claiming a right "under the Constitution . . . of . . . the United States."

This Petition is timely because Rule 13 of this Court allows a Petition for Writ of Certiorari to be filed within 90 days after the denial of a Petition for Rehearing. In this particular case the Court of Appeals denied the Rehearing Petition on July 11, 1994. Thus, this Petition is timely because it was initially postmarked October 7, 1994 and received on Tuesday, October 11, 1994 (Monday was a holiday).

Respondents have again filed their own Petition for Writ of Certiorari in this matter. *City of Henderson v. Nevada Entertainment Industries*, No. 94-662. The instant Petition is not to be considered a cross petition, but both seek review of the same decision below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> "... No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

Petitioners Nevada Entertainment Industries, Inc. and Daniel Bishop (hereinafter "Nevada Entertainment") initiated this proceeding in the United States District Court for the District of Nevada under the Federal Civil Rights Act, Title 42, United States Code Section 1983 to enjoin the City of Henderson and its Chief of Police (Respondents, hereinafter referred to as "City of Henderson") from enforcing certain unconstitutional ordinances. Nevada Entertainment was operating a retail business that sold sexually explicit but constitutionally protected books, magazines, and video tapes. Nevada Entertainment also exhibited sexually explicit but constitutionally protected video tapes at its premises in Henderson, Nevada. Nevada Entertainment also sought a declaratory judgment that certain provisions of the Henderson Municipal Code were constitutionally invalid.

Essentially Nevada Entertainment contended in the District Court that the regulatory scheme of the City of Henderson was invalid because its ordinances gave too much discretion to City Officials to decide whether a business such as the one being operated by Nevada Entertainment could operate. Nevada Entertainment relied on such

cases as *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L.Ed.2d 603, 110 S.Ct. 596 (1990); *Staub v. City of Baxley*, 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277 (1958); *Schneider v. State*, 308 U.S. 147, 84 L.Ed.2d 155, 60 S.Ct. 146 (1938).

The action was filed after the City of Henderson had decided to revoke Nevada Entertainment's business license on the ground that it fraudulently obtained a business license from the City by misrepresenting to the City the nature of the business it intended to operate in the City of Henderson. Instead of seeking judicial review in the Nevada State Court of the revocation order, Nevada Entertainment filed the instant independent action in the federal court challenging the constitutionality of the ordinances themselves.

On May 30, 1990, the City of Henderson filed its answer to Nevada Entertainment's federal civil rights complaint. The City of Henderson pleaded no affirmative defenses in its answer.

On June 5, 1990, the District Court granted a preliminary injunction in favor of Nevada Entertainment. The basis for the preliminary injunction granted by the District Court was the likelihood that the Court would find the ordinances in question to be unconstitutional.

Although Nevada Entertainment also challenged the propriety of the City of Henderson's revocation of its business license and alleged, in connection with that challenge, that it did not obtain its business license by deception, Nevada Entertainment primarily attacked the constitutionality of the ordinances themselves and did not pursue its claim that the City of Henderson erroneously concluded it had been deceptive.

The case was tried to the District Court on the basis of the administrative record and other documents. The parties

filed trial briefs. Nevada Entertainment contended that the ordinances were unconstitutional and the City of Henderson contended the District Court lacked jurisdiction because of the abstention doctrine. At no time did the City of Henderson ever contend either it its Answer to the Complaint or in its trial brief that Nevada Entertainment's action should be dismissed for lack of clean hands. The Clean Hands Doctrine was never invoked by the City of Henderson in its Answer to the Complaint or in its trial brief.

Notwithstanding the fact that neither side argued the clean hands issue, the District Court rendered its decision on that basis, finding that Nevada Entertainment is precluded from challenging the constitutionality of the ordinances by virtue of having "unclean hands." The District Court, indeed, acknowledged the fact that neither side argued this point in footnote 1 of its Decision where the District Court stated:

> "The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether Plaintiffs' fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.
>
> Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law."[1] (Appendix 1, p.6)

The District Court, on its own motion, then proceeded to rule that it would not decide the constitutionality of the

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[1]Because the unclean hands issue was not pleaded, Nevada Entertainment entered into a stipulation that allowed the District Court to decide the case on the basis of a transcript of proceedings before the Henderson City Council and other matters. There was no evidentiary hearing before the District Court. No witnesses were called and there was no discovery.

ordinances because Nevada Entertainment was allegedly deceptive in obtaining its business license and therefore disqualified from obtaining a ruling on the merits.

The District Court cited this Court's criminal cases of *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969); *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966); and *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938).

The District Court also relied upon the decision from the United States Court of Appeals for the Fourth Circuit in *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir.) *cert.den.* 419 U.S. 836 42 L.Ed.2d 63, 95 S.Ct. 64 (1974).

The United States Court of Appeals for the Ninth Circuit, after first filing an opinion regarding the abstention issue and later withdrawing it, affirmed the judgment of the District Court on May 4, 1994. The Court of Appeals acknowledged that the City of Henderson never pleaded the Clean Hands Doctrine as a defense nor asked that the case be dismissed on this ground. The Court of Appeals, however, felt that since Nevada Entertainment had pleaded that its conduct was not fraudulent and since the City of Henderson had denied that allegation in its answer that the issue was therefore presented for resolution by the District Court.

With respect to the alleged deception, the facts of this case established that Nevada Entertainment entered into a lease for certain property on February 17, 1989 at 1100 N. Boulder Highway, Henderson, Nevada. The property consisted of an improved building and a large parking area. At the time Nevada Entertainment intended to operate a business wherein sexually explicit materials would be sold and exhibited. At that time the City of Henderson did not extensively regulate such businesses because they did not exist in the City. At the time the property was properly zoned for such a use.

After Nevada Entertainment entered into a lease, the City on April 4, 1989 enacted a comprehensive revision of its zoning laws. Its new ordinance defined adult bookstores and arcades and limited them to a newly created CH zoned category. Although the City by ordinance adopted April 4, 1989 purported to restrict adult bookstores and arcades to the CH zone, no property at the time was zoned CH.

When Nevada Entertainment approached City officials in July or August of 1989 to inquire about a business license, Nevada Entertainment's representative answered in the affirmative when questioned by a City official as to whether or not the business was going to be an adult oriented type of business.

When a representative of Nevada Entertainment was advised that the City would not issue a business license to it because the City did not allow such businesses anywhere in the City, Nevada Entertainment submitted a new application which contained the following information under the heading "Occupancy Use Information:"

> "Mass media books and video store; novelty shop, etc. . . ."

When Nevada Entertainment opened its business on February 1, 1990 as an adult bookstore and arcade, the City of Henderson took action to revoke its business license on the ground of fraud in obtaining of the license. It was after a hearing before the City Council wherein the City Council revoked the business license for alleged fraud that Nevada Entertainment then filed the instant federal civil rights lawsuit attacking the constitutionality of the City of Henderson's business license, zoning, and conditional use permit ordinances.

The City of Henderson has not amended its unconstitutional ordinances, yet Nevada Entertainment is precluded in

perpetuity from challenging them because of its alleged deception.

ARGUMENT

Certiorari should be granted to allow this Court to determine whether this Court's three criminal cases (*Bryson, supra, Dennis, supra* and *Kay, supra*), which precluded a defendant in a criminal fraud case from challenging the constitutionality of the regulatory system, allow a District Court, on its own motion, to decline to rule on the constitutionality of certain ordinances because of alleged deception committed by the one challenging the ordinances.

In *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938), this Court determined that a defendant convicted of making a false application to the Homeowners' Loan Corporation, a federal agency, could not challenge her conviction on the ground that Congress had no authority to create the very agency to which the application was submitted. This Court stated at 303 U.S. 6,

> " . . . When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

The *Kay* case involved a criminal prosecution for the submission of false statements. The statute in question was not being challenged by one seeking to exercise a constitutional right. The First Amendment was not involved. It was a criminal case, not a civil case.

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966) was also a criminal case. The defendants were convicted of filing false statements with the National Labor Relations Board to obtain certain benefits. This Court de-

clined to allow the defendants to challenge the constitutionality of the statute that required the statements to be submitted. This Court stated at page 865:

> "We need not reach this question, for petitioners are in no position to attack the constitutionality of Section 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent law and not to challenge it — a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction."

Justices Douglas and Black dissented from this Court's ruling.

Finally, the last relevant criminal case decided by this Court on the subject is *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969). *Bryson* involved a collateral attack upon an earlier judgment of conviction. The District Court had set aside the convictions, but the Ninth Circuit reversed, finding no significant differences between the case and this Court's decision in *Dennis*. The question in *Bryson* was the same as the question in *Dennis*, whether one who is convicted of submitting a false statement to the National Labor Relations Board can avoid the conviction by challenging the constitutionality of the statute. All three cases, *Kay*, *Bryson*, and *Dennis*, involved criminal convictions for submitting false statements to federal agencies. None of the cases involved a constitutional challenge to a local ordinance based on the First Amendment. None of these cases involved an attempt by a municipality to shut down an activity protected by the First Amendment. None of these three criminal cases involved censorship. None involved the dis-

qualification of a civil plaintiff from seeking federal relief. Nevada Entertainment is forever barred from obtaining federal relief against facially invalid ordinances because of alleged deception in the license application. Nevada Entertainment was not deceptive in its federal litigation.

In addition to these three criminal cases, the District Court and the United States Court of Appeals for the Ninth Circuit relied extensively upon a twenty year old decision by the United States Court of Appeals for the Fourth Circuit *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir. 1974), wherein a school teacher who deliberately withheld from his application for employment information relating to his homosexuality was precluded from maintaining a lawsuit filed for the purpose of recovering his teaching position. The District Court concluded in *Acanfora* that the school teacher could not invoke the Court's processes to obtain relief because of his own deception in concealing his homosexuality from the School Board. The District Court's decision was affirmed by the United States Court of Appeals for the Fourth Circuit which cited this Court's decision in *Kay v. United States.*

As far as Nevada Entertainment knows, *Acanfora v. Board of Education* is the only civil case that has followed this Court's criminal cases, *Bryson, Dennis* and *Kay*.

Nevada Entertainment respectfully submits that the District Court and the Court of Appeals unnecessarily followed *Acanfora*, which in turn was based upon this Court's three criminal cases. It does not appear that the Fourth Circuit has continued to adhere to its *Acanfora* decision.

Most recently, Shannon Faulkner decided to challenge the constitutionality of the practice and policy of The Citadel, a military school in South Carolina, which prohibits females from enrolling. Ms. Faulkner deliberately concealed from The Citadel the fact that she was a female. Her

conduct was described by Circuit Judge Hamilton in his dissenting opinion in *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), wherein a majority affirmed the granting of a preliminary injunction by the District Court which allowed Ms. Faulkner to enroll in day classes pending a decision on the merits. Circuit Judge Hamilton pointed out in footnote 4 of his dissenting opinion the facts of her enrollment:

> "As a final point, it has been suggested that Faulkner's tactics in gaining admission to The Citadel, i.e., surreptitiously eliminating any reference to her gender on documents accompanying her application, violated The Citadel's strict code of honor. . . ."

After the Fourth Circuit's decision upholding the preliminary injunction was filed, the trial was conducted in the United States District Court for the District of South Carolina. Chief District Judge Houck rendered judgment for Shannon Faulkner, finding the practice of The Citadel in excluding females to be a violation of the Fourteenth Amendment. Chief Judge Houck made the following finding of fact in his decision:

> "Faulkner is a 19 year old female who is a resident and citizen of the State of South Carolina. Her home in Powdersville, South Carolina, where she attended Wren High School and was a 1993 honor graduate. In January 1993 Faulkner applied to be admitted to the Corps of Cadets at the Citadel. She was thereafter advised by Citadel officials that her application had been provisionally accepted and that full acceptance was contingent upon her completion of all high school courses and the submission of final high school transcripts and certain medical and drug testing information. On February 10, 1993, The Citadel wrote Faulkner a letter revoking its acceptance of her applica-

> tion and advising her that she would not be admitted to the Corps of Cadets because of her sex."

Faulkner v. Jones, ____ F.Supp. ____ (D.C.S. Car. 1994).

This Court should grant certiorari to decide whether or not its criminal cases are applicable to civil rights lawsuits brought by plaintiffs attacking the constitutionality of ordinances and the conduct of City officials in enforcing those ordinances. As far as Nevada Entertainment knows, this Court has never determined that the clean hands defense may be raised by the District Court on its own motion to deprive a civil rights plaintiff of the right to challenge the constitutionality of governmental conduct. With all due respect to the District Court and the Court of Appeals, this Court's criminal cases are distinguishable. There the defendants were being prosecuted for making fraudulent statements. They each faced one criminal prosecution. Here, Nevada Entertainment will forever be barred from the City of Henderson because of the existence of unconstitutional ordinances which it is precluded from attacking.

In the instant case Petitioners' conduct was no different than the conduct of Shannon Faulkner. How else could Shannon Faulker expose the discrimination practiced by The Citadel other than applying for admission without disclosing her gender. That was clearly deceptive but it was necessary in order to expose the discrimination practiced by The Citadel. Otherwise, had she truthfully disclosed her gender The Citadel would have rejected her for reasons other than her gender. Once The Citadel provisionally accepted her in the mistaken belief she was a male, it could not reject her for a pretextual reason. Also, it was important for Ms. Faulkner to actually enroll while she pursued her litigation.

Similarly Nevada Entertainment herein had to establish its right to do business free from unconstitutional ordinances. The Courts below wondered why Nevada Entertainment could not have challenged the initial rejection of its application. This question could have been asked of Ms. Faulkner. Why could she not have truthfully disclosed her gender and then sued? She would not have been successful because The Citadel would have denied her application for a pretextual reason. More important, she had to be enrolled as a student while she litigated. It is much more difficult to fight while on the outside.

With respect to an adult bookstore, a truthful application is frequently met with pretextual denials, *e.g.*, lack of parking. Moreover, it is financially impossible for most adult bookstores to afford to litigate if not actually operating. Very few, if any, bookstores can pursue years of litigation while not operating. Most cities maintain unconstitutional regulatory ordinances to keep adult bookstores out. The only viable way to challenge an unconstitutional ordinance is to litigate while operating.

The decision below ignores realty and also the constitutional requirements of standing and ripeness. There is no real case or controversy until the city threatens to shut down an existing bookstore.

Persons interested in opening adult bookstores cannot afford to go from city to city challenging invalid ordinances unless they can actually open and operate. If one were to challenge an ordinance first, without opening for business, the city would amend its ordinance to conform to the Court's ruling. In all likelihood, the amended ordinance would allow an adult bookstore at some other location, but not the one for which the application was made.

Many cities have done this. Cities throughout the United States are very cleverly excluding new adult bookstores by

maintaining unconstitutional licensing and zoning schemes that cannot be challenged without deception.[2]

There appears to be a conflict between what is occurring in the Fourth Circuit with Shannon Faulkner on the one hand and Nevada Entertainment in the Ninth Circuit on the other. This Court should grant certiorari to resolve the conflict and to decide whether its criminal cases are applicable to First Amendment challenges to unconstitutional ordinances.

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[2]Nevada Entertainment of course, does not concede that it was deceptive. Unfortunately, both the District Court and the Court of Appeals have found against it on this issue. Therefore, rather than challenging those findings here Nevada Entertainment proceeds on the assumption that it was deceptive. In other words, assuming deception, the District Court should still have reached the constitutionality of the ordinances. Otherwise, Nevada Entertainment is an "outlaw." It can never get protection by the Court. The criminal cases, however, are different because the defendants will not continually be subjected to unconstitutional ordinances. Here Nevada Entertainment is forever barred from the protection of the federal courts. Clearly the "punishment" for practicing a little deception cannot be banishment from the judicial system. Now it is at the mercy of a hostile city free to enforce at will its patently unconstitutional ordinances. If the City wanted to punish Nevada Entertainment for the alleged deception perhaps the City could have done so. However, the City cannot forever bar Nevada Entertainment from operating within its jurisdiction by enforcing forever its clearly unconstitutional ordinances. Neither the District Court nor the Court of Appeals was willing to put any time limit on Nevada Entertainment's disqualification from seeking judicial relief. Thus, for all time it is banished from the judicial system. For this reason this Court's criminal should not be extended to civil rights cases.

CONCLUSION

For the foregoing reasons, Nevada Entertainment respectfully urge this Honorable Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioners

APPENDIX 1

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN **NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. V. CITY OF HENDERSON, ET AL.**, NO. CV-90-00264-LDG (LRL), ENTERED NOVEMBER 27, 1992.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

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[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs' (Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs,	CV-S-90-264-LDG (LRL)
v.	JUDGMENT
CITY OF HENDERSON, et al., Defendants.	[ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

LLOYD D. GEORGE
United States District Judge

APPENDIX 2

MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN **NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. V. CITY OF HENDERSON, ET AL.**, NO. 92-17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED MAY 4, 1994.

[Filed May 4, 1994; Cathy A. Catterson, Clerk, U.S. Court of Appeals]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al.,	Nos. 92-17054 93-15052
Plaintiffs/ Appellants/ Cross-Appellees,	D.C. No. CV-90-00264-LDG
	MEMORANDUM*
CITY OF HENDERSON, a Nevada Municipal Corporation et al.	
Defendants/ Appellees/ Cross-Appellants.	

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted May 10, 1993

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

San Francisco, California

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,** Senior District Judge.

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and, since no such zone existed, it would have to apply for a zone change or variance as well as a conditional use permit. Instead, Nevada Entertainment filed a

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**The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment then opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment had misrepresented the nature of the business it intended to open. After a hearing, the City Council issued an order revoking the license because of the misrepresentation in Nevada Entertainment's application. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under Younger v. Harris, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground that under Dennis v. United States, 384 U.S. 855 (1966), Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We affirm the judgment of the district court on the basis of Dennis and dismiss the cross-appeal as moot.

I. NEVADA ENTERTAINMENT'S APPEAL

The district court properly declined to consider the constitutionality of the ordinances. "One who elects [to commit fraud] as a means of self-help may not escape the consequences by urging that his conduct

be excused because the statute which he sought to evade is unconsitutional." Dennis, 384 U.S. at 867; see also Ancafora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (teacher could not challenge dismissal on the basis of discrimination where he was dismissed because he lied on his application). Nevada Entertainment's license was not revoked because of the nature of its business activity, but rather because Nevada Entertainment's application misrepresented the nature of its business.

Nevada Entertainment argues the district court should not have relied on Dennis because the issue of fraud was "never pleaded nor briefed." However, the federal complaint for declaratory and injunctive relief specifically alleged "[p]laintiffs made no material misrepresentations on their application," and the City's answer

denied the truth of this allegation. As the district court recognized, the City contended throughout the litigation that the constitutionality of the ordinances was not at issue since "the plaintiffs' ... license was revoked because of their own fraud, not because of the nature of their business." The stipulated record on which the case was tried in the district court included transcripts of the city council hearing, which was devoted exclusively to the issue of fraud. Nevada Entertainment had adequate notice that its fraudulent conduct was one of the issues in the case.

Nevada Entertainment also argues the administrative record is insufficient to support the district court's finding of fraud because there was no opportunity to present "affirmative evidence" to support the contention that it was "induced" to

falsify the license application. However, the testimony on which Nevada Entertaiment relies to support this inducement argument was in the record before the district court, and Nevada Entertainment does not point to any additional evidence in support of its argument or suggest it would have been barred from presenting such additional evidence to the city council. The district court's finding of deceptive co.duct is amply supported by the record.

Nevada Entertainment argues that even if its conduct were deceptive, the district court should have allowed some "deception" to permit Nevada Entertainment to position itself to challenge the constitutionality of the ordinances. Nevada Entertainment offers no reason why it could not simply have challenged the denial of the original

application rather than submitting a second, fraudulent application.

II. THE CITY'S CROSS-APPEAL

The City cross-appealed arguing Nevada Entertainment's entire action should have been dismissed under Younger. Since the City has prevailed in the district court and on appeal, any discussion of the City's argument would be advisory. See Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 853-54 (9th Cir. 1985). We decline to reach the abstention issue and dismiss the cross-appeal as moot.

The judgment of the district court if AFFIRMED. The City's cross-appeal is DISMISSED as moot.

APPENDIX 3

ORDER OF COURT OF APPEALS FOR THE NINTH CIRCUIT, IN CASE NO. 92-17054, 93-15052, DENYING THE PETITION FOR REHEARING OF NEVADA ENTERTAINMENT AND DENYING BOTH THE CITY OF HENDERSON'S MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND ITS MOTION FOR ORDER STAYING THE MANDATE.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

Nevada Entertainment's Petition for Rehearing is DENIED. The City of Henderson's Motion for Leave to File a Second Petition for Rehearing is DENIED. The City of Henderson's Motion for Order Staying the Mandate is DENIED.

(2)

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-786

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC.,
A NEVADA CORPORATION AND DANIEL BISHOP,

PETITIONERS

v.

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION,
JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

RESPONDENTS

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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175 pp

QUESTIONS PRESENTED BY RESPONDENT CITY OF HENDERSON ET. AL., IN RELATION TO ELEVENTH AMENDMENT INFIRMITIES IN LIEU OF PETITIONER NEVADA ENTERTAINMENT'S QUESTIONS 1, 2, AND 3.

I

Whether the filing of the federal civil rights complaint by Nevada Entertainment Enterprises, Inc., a Nevada Corp. and citizen of the State of Nevada, in the U.S. District Court for the District of Nevada on April 24, 1990, while the Nevada State License Revocation Proceedings were still pending before the City Council of Henderson sitting as a Nevada Quasi-Judicial Board of Fact Finders, in which a quasi-judicial order of business license revocation by the Henderson City Council had been voluntarily stayed for 10 days by the City Council from its issuance on April 16, 1990 to May 1, 1990, for the purpose of permitting Nevada Enterprise to appeal such license revocation order to the Nevada District Court, under the State of

Nevada procedure, and Nevada Enterprises' procurement and execution of a compulsive federal temporary restraining order, and compulsive preliminary injunctions of the U.S. District Court and the U.S. Court of Appeals, which extended the City Council's stay order indefinitely and interfered with the State of Nevada's Administration of the judicial procedures; constituted a "patent" violation of the Eleventh Amendment to the Federal Constitution by Nevada Entertainment which, per force, ousted the federal courts of subject matter jurisdiction and required the U.S. District Court and Court of Appeal to abstain and dismiss such Complaint in the U.S. District Court under this Court's binding precedents in Huffman v. Pursue Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools Inc., 477 U.S. 619 (1986).

II

Whether the City of Henderson was denied due process of law by the Ninth Circuit Court of Appeals' (Browning, Canby, and Kelleher) Order of April 7, 1994 withdrawing its opinion in 8 F3, 1348, without cause and without explanation, and refusal of that Court to apply (as the law of the case) the rulings of this Court in Huffman v. Pursue Ltd., supra, and Ohio Civil Rights Commission v. Dayton Christian School, Inc., supra, which the Ninth Circuit on November 2, 1993 had held to be binding precedent in Nevada Entertainment Industries Inc. v. City of Henderson, 8 F3, 1348, and which required the federal court to dismiss the federal complaint, but which refused to rule upon the City's additional claim that the dismissal was predicated upon an Eleventh Amendment violation; and for lack of subject matter jurisdiction, and where such refusal, and subsequent withdrawal has caused Nevada Entertainment

Inc., thereafter, in its Response in No. 662 and its Petition in No. 786, to change its prior arguments, and to file this petition for writ of certiorari under a (different) rule of law which had not, theretofore, been available to it under the Huffman v. Pursue, and Dayton Christrian School rulings which required a dismissal of the federal civil complaint for violation of the Eleventh Amendment, see Petition for Writ of Certiorari in 94-662 at pages 32 and 33, and 34.

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In the Supreme Court
of the
United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP
Petitioners,
vs.
CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The respondents City of Henderson, a Nevada Municipal corporation, and JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, respectfully request that this Court summarily deny Nevada Entertainment's petition for writ of certiorari, seeking review of the Ninth Circuit opinion in this case which is unreported, as a frivolous petition,

without any merit whatsoever, or consolidate this Petition with the City of Henderson's Petition in Case No. 662 and set both Petitions for argument and decision on the questions raised in Case No. 662.

THE NEVADA ENTERPRISE STATEMENT OF FACTS IS EGREGIOUSLY IN ERROR.

The petitioners' NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP (hereinafter "Nevada Entertainment) statement of the facts, which appears at pages 4-8 under the heading "Statement of the Case", is egregiously in error, and is fatally flawed in relation to Nevada Entertainment's present election, after 4 years of litigation, to "change its tune" and now argue for the first time, in the face of uncontrovertible facts to the contrary, that it pleaded an "independent action in the federal court which has raised a serious challenge to the

constitutionality of the ordinances themselves. See page 5 at lines 6-15 reading:

> "The action was filed after the City of Henderson had decided to revoke Nevada Entertainment's business license on the ground that it fraudulently obtained a business license from the City by misrepresenting to the City the nature of the business it intended to operate in the City of Henderson. Instead of seeking judicial review in the Nevada State Court of the revocation order Nevada Entertainment filed the instant independent action in the federal court challenging the constitutionality of the ordinances themselves." (Our emphasis).

The above statements of fact at page 5 and others at pages 4-8 are totally false because such language has been carefully crafted and purposely omits other essential "facts' which are necessary for a proper understanding of their full and truthful meaning and significance, and should be totally disregarded for the special purpose intended by Nevada Entertainment in their petition in No. 786. (As a substitute therefore, the City of Henderson has setforth hereinafter at

pages 5-37 the Statement of Facts in the City's Petition for Writ of Certiorari in Case No. 94-662 at pp. 3-36). The "irregularity", described above, also appears in Nevada Entertainments' Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in City of Henderson, a Nevada Municipal Corporation, et al. v. Nevada Entertainment Industries, Inc., a Nevada corporation and Daniel Bishop, in the Supreme Court of the United States, October Term 1994, No. 94-662, Docketed on October 11, 1994. There, the Petition of the City of Henderson dealt with said "irregularity" in a comprehensive manner in its Reply Brief. The Reply Brief in No. 94-662 is equally relevant to this Petition in 94-786. A copy thereof is attached at Appendix A to "Respondents Brief in Opposition" herein in No. 94-786.

The Statement of Facts in the City's Petition includes the City's use of the "clean hands" equity doctrine, res

judicata, collateral estoppel and other such facts which are "selected omitted" in the Nevada Entertainment petition.

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zongin Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under State law and the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, thruthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses

which required application for a conditional use permit (as to which Nevada Entertainment, Inc. has never filed an application).

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a revenue based business license, indicating that their intended use of the property would be that of an "adult business." In applying for the business license, Federal Plaintiffs learned of the new provisions for sexually oriented adult businesses, including the need to apply for a zone change or variance, and a request for a conditional use permit, to permit them to operate such a business at their specific location.

Federal plaintiffs were informed by

the City that, under the applicable zoning provisions, the site they had rented was not then zoned for "adult use," and that if they wanted to operate an "adult use," they would have to request a variance or change in zoning.

Federal plaintiffs asked City officials if they could immediately open for business if they decided to operate a different use, such as a general video store (which was a separate and distinct use from an adult business under the new zoning code). They were told that their rented site was zoned for use as a general video store, but since this was a change in the described use in their business application form, they could qualify for issuance of a business under that use only if they resubmitted their business license application and indicated their intention to open a general video store.

Federal plaintiffs did not apply for a zone change or variance or conditional use permit. Instead, they submitted an

amended application for a business license, in which they intentionally and with knowledge of the substantive difference between the two categories, applied for permission to operate a business fraudulently described as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business."

In September of 1989, federal plaintiffs, on the basis of this intentional misrepresentation, were issued a revenue-based business license to operate a general video store on the Premises located at 1100 Boulder Highway, Henderson, Nevada, under the name "Fantasy Video Plus."

The operation opened for business in or about February 1990. Although Federal Plaintiffs had represented to the City during the business license application process that the business use for "Fantasy Video Plus" would be that of a general video store, they immediately operated the

same as an "Adult Business." Federal plaintiffs admit in this action and have stipulated that since opening for business they have used the Premises for the continuous operation of a different business use, i.e. that of an Adult Business.

An Adult Business is a business use separate and distinct from a general video store. In the course of making application for their business license, federal plaintiffs had been made aware that there was a substantive difference between the two uses (general video vs. Adult Business), and had affirmatively assured the Community and Planning Departments' inspecting official that the business was not an "Adult Business" but was rather a general video business. See paragraph 6 of Licensees' Answer to Complaint, filed before the Henderson City Council in In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

When the licensees' deception came to the attention of the City inspectors, state law enforcement action was commenced through the filing of a complaint and the initiation of administrative license revocation proceedings against Federal Plaintiffs, which sought the revocation of the business license issued to the operation "Fantasy Video Plus," on the grounds that licensees had deliberately made fraudulent and material misrepresentations in their business license application in order to secure immediate issuance of the license. This state administrative enforcement action came before the City Council for hearing on April 10, 1990.

At the state license revocation proceedings, it was determined that

federal plaintiffs' misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues they sought to relitigate in their federal civil rights complaint under 42 U.S.C. Section 1983. (See Federal Plaintiffs' Answer to the City of Henderson Summons and Complaint before the City Council in license revocation proceedings, appearing as Appendix 1 in the Petition for Writ of Certiorari in Case No. 92-643.

The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by the municipal licensing ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") 4.06.160]. See copy of the City Council's findings of fact, conclusions of law, and order attached at Appendix 2 to the Petition for Writ of Certiorari in Case No. 92-643. Federal Plaintiffs incorrectly asserted at page 14 of their brief on appeal that the City "stayed its decision" for ten days. The correct statement is that the City, by its order dated April 16, 1989, revoked licensees' business license, but stayed enforcement action on the revocation, for a period of ten days, in order to allow the licensees an immediate and unfettered opportunity to have this revocation action reviewed by the state court, as provided by state law and municipal ordinance.

Instead of appealing the City

Council's (quasi-judicial) administrative factfinding and license revocation in state court, licensees filed this action in federal court as a defense to the City's enforcement action (which was pending because of the stay issued and the existence of a statutory right to appeal the City's action within the state judicial system), thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

It is important to note at the outset of these Statement of Facts that the gravamen of the 42 U.S.C. Section 1983 complaint is its federal interference with state judicial procedures, (not with mere City functions). The City, in defending against the civil rights complaint, is acting as an agent of the State and is relying upon the Eleventh Amendment, because it is claiming interference with the State's judicial procedures for review

of quasi-judicial findings-of-fact by municipal agencies.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. At the hearing on the TRO, Assistant City Attorney Liza Conroy cited New York Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, at 474 (1961), and unsuccessfully involked the "clean hands" equity doctrine, and the City Council's quasi-judicial finding of "fraud" as ground for requiring the United States District Court to rule that it lacked subject matter jurisdiction and to deny the equitable relief sought (injunction) and to dismiss the civil rights complaint for "lack of subject matter jurisdiction." (Note, in this regard, the City of Henderson's response dated January 16, 1994, to Attorney Diamonds Petition for Rehearing at Appendix Page 4-16 and 4-17 of No. 94-662.

that shortly thereafter (3 months later) the Ninth Circuit withdrew its November 2, 1993 Opinion and substituted its May 4, 1994 Memorandum.

On June 4, 1990, following oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed. A copy of the Temporary Restraining Order and Preliminary Injunction is attached at Appendix 3 and 4 to the Petition for Writ of Certiorari in Case No. 92-643.

After further study of the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., supra, as impacted by the United States Supreme Court's ruling in Hicks v. Miranda, 422 U.S. 332 (1973), the City of Henderson declared their refusal to consent to federal jurisdiction [see

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990 (setting forth the same issues which were present in the federal civil rights complaint); and (2) a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present all of their federal constitutional claims in the Nevada law enforcement lawsuit. (See, in this regard, Question 4 in Case 94-662 and the clash, in such cases, with respect to the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411

(1964).

The City of Henderson further requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

On March 22, 1991 (almost six months after Defendants herein had filed their motion to dismiss and request for an immediate hearing), the United States District Court herein filed its opinion and order which denied the Defendants' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. A copy of the March 22, 1991 Opinion and Order is attached at Appendix 16 to the Petition for Writ of Certiorari in 94-662.

On March 29, 1991, Defendants indicated to the United States District Court at a pre-trial conference that they

intended to file a Motion in which they would request the Court to amend its order of March 22, 1991, so as to authorize an immediate appeal to the Ninth Circuit Court of Appeals and, if necessary, to the United States Supreme Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's state right to adjudicate important State issues such as licensing (revocation) procedures and judicial review by the State of Nevada of the quasi-judicial fact finding of the City Council in which it revoked the license of Fantasy Video Plus because of the use of fraud in obtaining the business license. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. United States District Court Judge Lloyd George, without ruling on Defendants' motion on the abstention doctrine, indicated at said pre-trial conference that he wished to proceed quickly and hold

the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal.

On April 1, 1991, Defendants filed their Motion to Amend re Interlocutory Order and Stay Proceedings. On April 9, 1991, Judge George entered an Order denying the Defendants' Motion to Amend his March 22 Order (to permit an interlocutory appeal). A copy of the April 9, 1991 Order is attached at Appendix 6 to the Petition for Writ of Certiorari in Case No. 92-643.

On April 15, 1991, Defendants filed a Petition for writ of mandamus and request for a stay with the Ninth Circuit Court of Appeals. In its pre-trial Petition for Mandamus, the City relied upon the jurisdictional issue which Huffman triggered, but did not argue the res judicata/collateral estoppel jurisdictional issue. On May 2, 1991, the Ninth Circuit issued an Order denying the

petition and request for a stay. A copy of the May 2, 1991 Order is attached at Appendix 7 to the Petition for Writ of Certiorari in Case No. 92-643.

On May 9, 1991, Defendants filed a petition for writ of certiorari with the United States Supreme Court, pursuant to Rule 13 of the Rules of the Supreme Court of the United States City of Henderson et al. v. U.S. District Court, Oct. Term 1990, No. 90-1771, together with an Application for Stay, addressed to the Honorable Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, pursuant to 28 U.S.C. 2101(e) and Rule 23 of the United States Supreme Court Rules, requesting a stay pending final action on the Petition for Writ of Certiorari. On May 20, 1991, Associate Justice O'Connor denied this Application.

Pursuant to 28 U.S.C. section 2101(f) and Rules 22.5 and 23 of the Supreme Court Rules, Defendants then resubmitted their Application for Stay, addressed to

Associate Justice Anthony M. Kennedy, together with a motion for an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. section 1651(a) and United States Supreme Court Rule 23.1. This reapplication relied on Associate Justice Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (9th Cir. 1987), which seemed to infer agreement with the Petitioner's contention that the United States Supreme Court had clarified Huffman, so as to require in a federal case such as this, a dismissal based upon lack of "subject matter jurisdiction." Justice Kennedy referred said Application to the entire Court for action, which denied the application on June 10, 1991.

Ultimately, the federal trial herein was continued to September 9, 1991.

On July 17, 1991, attorney Roger Jon Diamond, counsel for the federal Plaintiffs herein, sent a letter to Liza

Conroy, Assistant City Attorney for the City of Henderson, which referred to the joint case conference report due in the related state declaratory judgment action (City of Henderson v. Nevada Entertainment Industries, Clark County District Court No. A288647) (hereinafter "related state case"), and stated that state defendants would sign the report, but with the understanding that the Clark County District court case would not go to trial unless the City was successful in obtaining a dismissal of the pending federal case.

On August 9, 1991, the Scheduling Order in the related state case was filed, which set the matter for trial on the court's earliest available date beginning March 9, 1992.

On August 12, 1991, a Stipulation for Order continuing the federal trial herein and Order thereon was filed, which continued the federal trial date herein from September 9, 1991, to January 6,

1992, with calendar call on January 2, 1992.

On October 7, 1991, the United States Supreme Court issued an Order denying the petition for writ of certiorari in Case No. 90-1771. On December 2, 1991, the United States Supreme Court denied a petition for rehearing.

Both Plaintiffs and Defendants filed trial briefs, and submitted the case for trial on the briefs. By stipulation, the evidentiary record from the state quasi-judicial proceeding was filed with the U.S. District Court and designated to be used as the evidentiary record before the United States District Court on trial of the final injunction. It should be noted that the stipulation of the record of the State quasi-judicial proceeding into evidence clearly established the City of Henderson's claims that the federal court's exercise of jurisdiction presented a "collateral" attack on the City Council's order, warranting use of the All

Writs Act.

The City then renewed its motion to dismiss for lack of subject matter jurisdiction, and also moved to dismiss on the grounds of res judicata and collateral estoppel. At this point, the trial judge apparently became aware of the implications of the City of Henderson's refusal to waive its Eleventh Amendment privilege (and its claim of lack of "subject matter jurisdiction") and his refusal to apply the rule of law expressed in Miranda v. Hicks on the City's first Motion to Dismiss which was denied on March 22, 1991. See Appendix 16 to the Petition for Writ of Certiorari in 94-662. On June 17, 1992, the Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, on his own motion, signed an Order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would amend his prior order denying that request. The

June 17th Order is attached at Appendix 8 to the Petition for Writ of Certiorari in Case No. 92-643. On July 2, 1992, the Court signed an order amending its prior Order of March 22, 1992 so as to certify the same for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). A copy of said Order is annexed to the Petition for Writ of Certiorari in Case No. 92-643 at Appendix 9.

On August 3, 1992, the U.S. Court of Appeals for the Ninth Circuit denied the City's Petition for Permission to Appeal Pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. Rule 5. See Appendix 10 to the Petition for Writ of Certiorari in case No. 92-643.

On October 13, 1992, the City of Henderson filed a Petition for Writ of Certiorari to the United States Court of Appeals in City of Henderson, a Nevada Municipal Corp. et al. v. U.S. Dist. Court, Dist. of Nev. [Nevada Entertainment Industries, Inc., a Nevada Corp. and

Daniel Bishop, Real Parties in Interest], Oct. Term 1992, No. 92-643.

On November 27, 1992, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL), see Appendix 1 to the Petition in 94-662, in which the Federal Court, in the face of the Huffman abstention doctrine and the Feldman doctrine, relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be

authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal

pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. See Supplemental Brief in Case No. 92-643, at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in Case No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion in which it

denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a Motion for Judgment of Dismissal on Grounds of Comity and Lack of Subject Matter Jurisdiction, pursuant to Huffman v. Pursue, Ltd..

On December 22, 1992 the Court of Appeals (Noonan and T.J. Nelson) filed an order: (1) denying the Motion to Dismiss; (2) granting Licensees' Emergency Motion for Injunction Pending Appeal; (3) staying the

U.S. District Court November 25, 1992 Order; and (4) expediting the appeal, ordered a detailed brief schedule, and set the matter for argument in San Francisco during the week of April 12 (see Appendix 2 to the Petition in Case No. 94-662).

On December 22, 1992, the City filed its Notice of Cross-Appeal to the U.S. Court of Appeals for the Ninth Circuit from the Trial Judgment entered on November 27, 1992.

On May 10, 1993, the Court of Appeals for the Ninth Circuit heard oral argument during which the Court stated to the City's counsel of record that it was not interested in hearing argument of the Eleventh Amendment jurisdictional issue, which was framed by Justice Kennedy's separate opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, supra.

On November 2, 1993, the Court of Appeals filed an Opinion and certified the same for Publication under Circuit Rule 36-2, in which it reversed the Judge of the

United States District Court and held that the Court should have abstained under Huffman v. Pursue, Ltd., as contended by the City in its cross-appeal, but omitted any reference to the Eleventh Amendment "subject matter jurisdiction" issue. (See copy at Appendix 3 to the Petition for Writ of Certiorari in Case No. 94-662.)

The Court of Appeals further held in relation to attorney's fees that "The District Court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal." The Opinion contained the following conclusion:

> "Conclusion"
>
> "The decision of the district court refusing to abstain from exercising jurisdiction is reversed and the case is remanded to the district court with instructions to vacate its judgment and dismiss the complaint." (Our Emphasis.)

On November 30, 1993, Nevada Entertainment Industries, Inc. et al filed a petition for rehearing and suggestion that the Court rehear the matter en banc which

emphasized the fact that the Court's opinion did not hold that the federal court lacked subject matter jurisdiction. [The Petition for Rehearing introduced new contentions such as "consent" to federal jurisdiction (see Appendix 4-10 through 4-17 to Case No. 94-662), and other contentions which are regularly advanced and considered in connection with the Wiener, infra, interpretation of Huffman abstention but totally inconsistent with the Dubinka, infra, interpretation of Huffman abstention].

On January 18, 1994, the City of Henderson et al. filed their "Response to the Petition for Rehearing and Suggestion for Hearing en Banc." See copy at Appendix 4 to Case No. 94-662, at Appendix pages 4-10 through 4-17, where the City claimed that the Court of Appeals' failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issue was responsible for the confusion which regularly appears in Huffman abstention decisions. Compare

Dubinka, infra, with Wiener, infra. The City's Response (see Appendix 4 to No. 94-662, at 4-17) ended with the caveat that, notwithstanding these many new claims of Nevada Entertainment Inc., the Ninth Circuit was faced with a "bottom line" record fact on appeal; that is, that Assistant City Attorney Liza Conroy at the outset had objected to the Court's jurisdiciton under the Equity maxim of "clean hands." (See Appendix 4 to No. 94-662, at page 4-17.)

On April 7, 1994, the Court of Appeals filed an order reading:

> "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9, 1993) is withdrawn."

See copy at Appendix 5 to the Petition for Writ of Certiorari herein.

On May 4, 1994, the Court of Appeals filed a Memorandum Opinion in which it noted in a footnote on page 1, that the Memorandum was not appropriate for publication and may not be cited to or by the court of the

circuit. Thereafter, the court reexamined the City's quasi-judicial proceedings and held that the district court's finding of deception by Nevada Entertainment Industries, Inc. et al., applied and was amply supported by the record and affirmed the district court's judgment on that basis, and dismissed the City's cross-appeal (i.e. that the civil rights complaint should have been dismissed for lack of "subject matter jurisdiction" under Younger v. Harris, 401 U.S. 37 (1971)) as moot. The Court made no ruling on the City's cross-appeal that the City was entitled to attorney fees. See copy of Memorandum decision at Appendix 6 to the Petition for Writ of Certiorari in in 94-662, and compare its earlier ruling on attorneys fee on November 2, 1993 at Appendix 3 to No. 94-662, at page 3-11.

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7 to the Petition in Case No. 94-662.

On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969, in an attempt to require the Court of Appeals to explain why it had withdrawn its November 2, 1993 opinion which had upheld the cross-appeal by the City re Huffman abstention, and why it had failed, and neglected, and/or refused to apply the rules of law established by the United States Supreme Court, which that opinion held were controlling, as the law of the case on the

City's cross-appeal.

On June 14, 1994, the Court of Appeals denied the City of Henderson's Petition for Rehearing. See Appendix 8 to the Petition for Writ of Certiorari in Case No. 94-662.

On June 17, 1994, the City of Henderson moved for leave to file a second petition for rehearing (based upon newly decided authorities: Kokkonnen v. Guardian Life Ins. Co. of America, 54 CCH S.Ct. Bull., p. B1724, decided May 16, 1994). See copy of Second Petition for Rehearing at Appendix 9 in Case No. 94-662. On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to the Supplemental Brief in Case No. 93-1969.

On July 11, 1994, the Court of Appeals denied the Petition for Rehearing of Nevada Entertainment and the City of Henderson's

motion for leave to file a second petition for rehearing. See Appendix 10 to the Petition in Case No. 94-662.

On July 25, 1994, the Court of Appeals granted Nevada Entertainment's motion to stay the mandate pursuant to Rule 41 (b). See Appendix 11 to the Petition in Case No. 94-662.

On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit, and on August 24, 1994, the Court of Appeals granted the Parties Joint Motion for Order Extending Stay of Mandate. See Appendix 12 to the Petition for Writ of Certiorari in Case No. 94-662.

THE ELEVENTH AMENDMENT FORBIDS THE FILING OF NEVADA ENTERTAINMENT'S FEDERAL COMPLAINT.

Nevada Entertainment's civil right complaint is not what Nevada Entertainment's petition represents it to be: an "independent action in the federal court." See copy of the civil rights Complaint at Appendix A (Appendix 2 to Reply Brief). In fact and as a matter of law, it is an action brought by a citizen of Nevada in the federal court against the Soverign State of Nevada, which the Eleventh Amendment forbids, which collaterally attacks an order of the City Council of Henderson for actions taken by it, acting as an agent for the Soverign State of Nevada, in a pending quasi-judicial license revocation proceeding within the Nevada State Judicial System, seeking revocation of Nevada Entertainment's business license on the ground of fraud in connection with its application for a business license. As such, the filing of the Federal Civil Rights Complaint, this trial, and this appeal in the federal court is in direct

conflict with and violates the Eleventh Amendment to the Federal Constitution and, precludes the Federal Court from assuming subject matter jurisdiction under its Article III powers and hearing such cause. In Welch v. State Dept. of Highway and Public Transportation et. al., 483 U.S. 468, at 472; 97 L.Ed.2 389, at 395 Justice Powell writing the plurality opinion for 4 justices held:

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.:
>
> The Court has recognized that the significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bring suit against the citizen's own State in federal court.

even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 10, 33 L.Ed. 842, 10 S.Ct. 504 (1890). See Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.' Ex parte New York, No. 1, 256 U.S. 490, 497, 65 L.Ed. 1057, 41 S.Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L.Ed. 1063, 41 S.Ct. 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, n 17, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (plurality opinion of Stevens, J.); id., at 706-710, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (White, J., concurring in judgment in part and dissenting in part)."

See also the annotation "Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over suits against States' 106 L.Ed.2 660 at 677:

"the following Supreme Court decisions have expressly recognized

that the Federal Constitution's Eleventh Amendment is not limited in its application to suits against a state as a named defendant, but rather that its application should be determined by the essential nature and effect of the suit in question: Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903; Re Ayers (1887) 123 US 443, 31 L.Ed. 216, 8 S Ct 164; Pennoyer v. McConnaughy (1891) 140 US 1, 35 L Ed 363, 11 S Ct 699; Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654; Ex parte New York (1921) 256 US 490, 65 L Ed 1057, 41 S Ct 588; Principality of Monaco v. Mississippi (1934) 292 US 313, 78 L Ed 1282, 54 S Ct 745; Worcester County Trust Co. v. Riley (1937) 302 US 292, 82 L Ed 268, 58 S Ct 185; and Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

It was observed by the Supreme Court in Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903, infra section 15[c], that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, and that the Eleventh Amendment is to be substantially applied in furtherance of its intention, and not evaded by technical and trivial subtleties.

The court in Re Ayers (1887) 123 US 433, 31 L Ed 216, 8 S Ct 164, infra section 15[b], also stating that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, added that such amendment's prohibition must be determined by a consideration

of the nature of the case as presented on the record.

In Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654, the Supreme Court recognized that looking through form to substance, the Eleventh Amendment applies not only where the state is actually named as a party defendant on the record, but also where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party.

In Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 71 Ohio Ops 2d 474, infra section 22, which involved a federal civil rights action against a state governor and other state officials, the Supreme Court stated that it was well established that the Eleventh Amendment barred suits against the state not only when it was the named party, but also when it was the party in fact. The court noted that the applicability of the Eleventh Amendment was to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding as it appeared from the entire record." (our emphasis).

The City of Henderson contends herein (Case No. 94-786) and in Case No. 94-662 as follows: [See] copy of the City's Reply Memorandum in Case No. 94-662 at page 15 reading:

"...Nevada Entertainment deliberately chose to collaterally

attack the quasi-judicial fact finding of 'fraud' made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding 'abstention' precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish 'standing' at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)"

RESPONDENTS' OBJECTIONS TO PETITIONERS QUESTIONS 1, 2 AND 3

Petitioner Nevada Entertainment is deliberately attempting to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copy of Reply Brief at Appendix A to this Brief (Appendix 4 to Reply Brief). The use of

this frivolous petition for writ of certiorari for that purpose is a further patent violation of the Eleventh Amendment. The Eleventh Amendment was specifically adopted by the States in 1792 to forbid the use of the federal court system as Nevada Entertainment has attempted to do in this Petition for Writ of Certiorari, and is the foundation for the Huffman Abstention doctrine which requires a dismissal of the federal complaint, for lack of subject matter jurisdiction. This "frivolous" petition is the direct result of the Ninth Circuit's determined refusal to apply the law of the land (Huffman Abstention). The duty of the Ninth Circuit was to "find" and "apply" the law; not to "find" and "defy" the law.

In the City of Las Vegas case supra; the Nevada Supreme Court specifically held, one year earlier, (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business

license by deception may not collaterally attack the City Council's "fraud" finding and obtain the judicial relief which Nevada Entertainment seeks in Questions 1-3 of its petition for Writ of Certiorari in 94-786 in the same quasi-judicial proceedings which the State has brought to revoke its license for fraud in its business application. The District Court of Nevada had ruled to the contrary (see Appendix A, Reply Brief at pages 4-7). The Nevada Supreme Court reversed the District Court on that issue. Had Nevada Entertainment filed its civil rights action in the State Court as a part of an appeal from the Quasi-Judicial Order of the City Council revoking their business license, as it was required to do under Nevada State law, Questions 1-3, which had been asked and answered in the City of Las Vegas ruling in the Nevada Supreme Court in 1989, would have been decided against Nevada Entertainment.

Question 1 as framed by Nevada Entertainment reads: "May a city violate the first and Fourteenth Amendment (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtained its business license by deception?" Question 3 reads: "To prove that a city utilizes an uncontitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 for the purpose of answering the above 3 questions, is frivolous as a matter of law because the federal courts below lack "subject matter jurisdiction", under the command of the Eleventh Amendment. "The

Judicial power of the United States shall not be construed to extend to any suit..."

STATEMENT OF THE CASE

The "stake" in this lawsuit is the sovereign, Eleventh Amendment right of the City of Henderson, acting as the agent for the State of Nevada, to enact by ordinance and apply the "conditional use" zoning principle and the States use of quasi-judicial proceedings to adult book stores in Henderson, Nevada, and to have such ordinances relating to the State's laws and license revocation procedure and the use of quasi-judicial proceedings, tested for the first time in the State of Nevada Courts under Watson v. Buck, 313 U.S. 387 (1941), not in the federal courts. This Court should place a focus on this principle and label it "Watson v. Buck Abstention." Further, it should also identify the fact that all such special abstention defenses ("Younger" "Huffman") are derived from the Eleventh Amendment commands. That claim (which initiated

this litigation) was made four years ago under the City's contention that a "conditional use" ordinance could be constitutionally applied in such a case, see 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1414 at page 1426-1429. See Case No. 90-1771, at pages 52-61. See also Case No. 92-643 at Point III on pages 46-57, copies of which are attached to this Brief at Appendix B to this Brief. That the City was "prudent" in its judgment that a Nevada state court (and not a federal trial court) should make that judgment under Watson v. Buck, see and compare the bizarre result (contradictory holdings) reached by two courts in the most recent United States District Court and United States Court of Appeals opinions in the Prince George's County case in 11126 Baltimore Blvd. v. Prince George's County, Md., 32 F.3d 109 (1994) (August 12, 1994)!!!

Respondent contends that the record on appeal in this litigation establishes "pure" "constitutional" error of great magnitude -- not merely "judicial" error. It is not a matter of "correcting" technical errors in cases of only local importance where the correction in no way promotes the development of the law." Anderson v. Haless, 459 U.S. 412 (1982) (Stevens,J., dissenting), and is not "concerned with the correction of errors in lower court decision" or other errors which do not attain the title and rank of "constitutional" error (see the text in Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, at Section 5.12, "Summary Disposition on the Merits," at page 251.) This is a real controversy which is deserving of a grant of writ of certiorari by this Court. It is universally recognized that "adult businesses" pose their own peculiar law enforcement problems. In that regard, see City of Henderson news articles at

Appendix C to this Brief. As the present time, the duplicate expense to State government in prosecuting such State sovereignty, Eleventh Amendment rights to conclusion in abstention cases in two court systems is substantial, (see Appendix D to this Brief, for example, showing the costs to the City of Henderson to date in asserting this Eleventh Amendment right). As further injury, the Ninth Circuit having ruled that "Huffman Abstention" controls, has withdrawn that decision rather than rule on the specific rule of law which has been the "focus" of the four years of litigation. Under the present practices, the "chance" of achieving a hearing on the merits and prevailing "cost-wise" in abstention litigation is routinely characterized as being on a par with "Russian roulette". It is for this latter reason that many abstention rulings, which should have been appealed, have not been appealed.

Nevada Entertainment's use of the

federal court to collaterally attack the quasi-judicial finding of fact of "fraud" by the City Council was intentional, and was designed to avoid confrontation in the State Court with the binding decision of the Nevada Supreme Court in City of Las Vegas v. Nevada Enterprises, (supra).

The procedural tactic Nevada Entertainment followed in the quasi-judicial proceeding in this case was identical to that employed by Pursue, Ltd. in the judicial proceeding involved in Huffman v. Pursue, Ltd. The only difference is that, in the Huffman case, Pursue, Ltd. obtained its "stay" from the federal district court; and in this Henderson case, Respondent first obtained the necessary "stay" from the City Council by mutual agreement to permit an appeal of the City Council's ruling; thereafter, Nevada Entertainment was able to continue that stay in force by virtue of the United States District Court's and Court of Appeals' injunctions.

Further, Nevada Entertainment subjectively must have known (through its attorneys who are "experts" in this area of the law and as a reasonable person) that its federal action was barred by the Eleventh Amendment and this Court's ruling in the Dayton case.

CONCLUSION

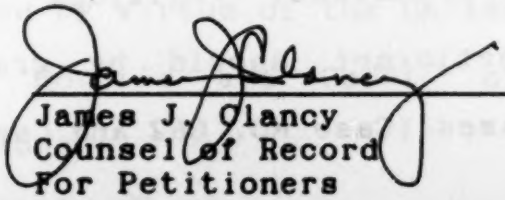
For all of the above reasons and others, given in Reply to the Response Brief of Nevada Entertainment in Case No. 94-662, and in this Response Brief to the Nevada Entertainment Petition in Case No. 94-786 and because the the Henderson trial facts and record on appeal parallel Huffman trial facts, as applied to the rule of law expressed in Dayton (which makes Huffman binding in quasi-judicial proceedings), Attorney Diamond's claim in his Response Brief in Case No. 94-662 of an "open question" is without support. Nevertheless, Petitions for Writs of Certiorari should be granted and both cases (Case No. 662 and Case No. 786)

consolidated and set for oral argument on the City of Henderson's claim of a right to reinstatement of the opinion and judgment which was reported on November 2, 1993, in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348, and relief for its Eleventh Amendment injury including its right to attorneys' fees under common law and statutory law and Rule 11 as the prevailing defendant under 42 U.S.C. Section 1988 in relation to the "focal" issue re the Eleventh Amendment in this four year litigation.

See Supplemental Brief in Case No. 94-662, being filed concurrently with this brief in Case No. 94-786 for additional reasons why a plenary review of these issues should be granted at this time.

DATED: December 1, 1994

Respectfully submitted,



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Counsel of Record
For Petitioners

APPENDIX A

REPLY BRIEF OF THE CITY OF HENDERSON IN CITY OF HENDERSON ET AL. V. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., ON A PETITION FOR WRIT OF CERTIORARI IN NO. 94-662.

[Reference: Respondents' Brief in Opposition at pp. 4, 39, and 44.]

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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DOCKETED ON OCTOBER 11, 1994

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No. 94-662

IN THE

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v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED.

At pp. 2 and 5 of the Response Brief filed on November 9, 1994, Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment") has mischaracterized both the trial facts and the single legal issue which Nevada Entertainment has challenged. See p. 2, reading:

> "The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court having previously and expressly left open, should now resolve." (Our Emphasis.)

See page 5, reading:

> In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question." (Our Emphasis.)

In this Reply Brief, the City of Henderson submits that the excerpts of record on Nevada Entertainment's appeal and the City of Henderson's Cross-Appeal and the appellate records in this Court in

Case Nos. 90-1771, 92-643, and 93-1969 and at pages 7-29 of this Petition for Writ of Certiorari in Case No. 94-662, establish both as a historical fact and as a matter of law that the federal civil rights complaint which Respondent Nevada Entertainment, a citizen of the State of Nevada, filed in the U.S. District Court for the District of Nevada on April 24, 1990 directly interfered with the progress of the State of Nevada quasi-judicial (administrative) proceeding, which was then pending, and that said filing of a federal civil complaint of that nature, regarding a quasi-judicial matter which is properly before a Nevada tribunal, by a Nevada State citizen: (1) is forbidden by the Eleventh Amendment (i.e. the federal court lacks "subject matter jurisdiction"), and (2) was prohibited by this Court's landmark "abstention" decision in 1975 in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, and its more recent "binding" holding in 1986 in Ohio Civil Rights Commission v.

Dayton Christian Schools, Inc., 477 U.S. 619, at 629.

Nevada Entertainment's statement that the procedural historical facts in the trial court below are that: "Respondents filed their civil rights action after the decision of the City council became final" is an "egregious" misstatement of the trial record on appeal because: (1) an "abstract" statement of this nature, without reference to the record, is pointless; (2) it is true, both as a historical fact and as a matter of law, that the temporary restraining order and the preliminary injunction which were issued in Nevada Entertainment's federal civil rights action actually prevented the City Council's quasi-judicial order from becoming "final;" (3) it is true, both as a historical fact and as a matter of law that, from a procedural viewpoint the trial facts in this Petition cannot be distinguished from the trial facts in this Court's binding precedent in 1986, in Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, at 629 (1986), which extended the abstention doctrine expressed as to State judicial proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, to include quasi-judicial administrative proceedings; and (4) during the four years of litigation, three prior petitions on file in this Court have correctly stated and given notice that the record herein tracks the trial facts in Huffman, supra, which is binding upon the federal courts and Respondent has, nevertheless, recklessly continued to litigate. See "Statement of Facts" in No. 90-1971 at p. 22, 92-643 at pp. 5-12 and 19; 93-1969 at p. 15, and 94-662 herein, at pp. 4-36 generally, pp. 10-11 specifically.

II. STATEMENT OF THE CASE

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION.

At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief).

The concluding paragraph of the City Council's written order, dated April 16, 1990, which was served on Nevada Entertainment, read as follows (see Appellant's Excerpts Exhibit 1, pp. 2-3):

> "Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a/ FANTASY VIDEO PLUS, orders written notice of its decisions to licensees within five

(5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

[Signatures of Council]"

As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still "pending" up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day "stay" period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring "subject matter jurisdiction" on such

date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief.

The date ("April 24, 1990") is of paramount importance, because "the existence of federal 'subject matter jurisdiction' ordinarily depends on the facts as they exist when the complaint was filed in the U.S. District Court." See Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331, at fn. 4, emphasizing the above language and citing Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826, 104 L.Ed.2d 893, 109 S.Ct. 2718 (June 12, 1989) at 900; see also Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140, at 1143:

> "As a general rule, the proper point of reference for determining whether state proceedings are 'ongoing' is

the date the federal complaint is filed. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S.Ct. at 1529-30....See also Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceedings is pending when federal complaint is filed); Thomas v. Texas State Bd. of Medical Exam, 807 F.2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

"....

"The Younger line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. See, e.g., Younger, 401 U.S. at 44, 91 S.Ct. at 750; Huffman, 420 U.S. at 601-04, 95 S.Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' Cf. Huffman, 420 U.S. 604, 95 S.Ct. at 1208; Steffel, 415 U.S. at 462, 94 S.Ct. at 1217."

A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have "subject matter jurisdiction" on April 24, 1990, must, of necessity, follow from the "command" of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that "command" in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387 (1941). See also Questions I-IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii. a copy of which is attached at Appendix 3 to this Brief. It follows therefrom that Nevada Entertainment used the power of the federal court in an unlawful (Eleventh Amendment violation) tortious and unconstitutional manner, through the issuance and

enforcement of an unlawful (Eleventh Amendment violation) tortious, unconstitutional federal court temporary restraining order (April 27, 1990) and an unlawful (Eleventh Amendment violation) tortious, and unconstitutional preliminary injunction (May 30, 1990) (See copy of Injunction Orders in Appellants' Excerpts of the Record at Exhibits 2 and 3), to: (1) extend the City Council's 10 day stay indefinitely, and (2) unlawfully, tortiously, and unconstitutionally prevent the City Council's quasi-judicial Order of April 16, 1990 from becoming a final enforceable order, which could be used to execute the will of the City Council acting as an agent for the Sovereign State of Nevada.

Petitioner City of Henderson contends that the "impasse" which such injunction order created was subjectively brought to the attention of U.S. District Court Judge Lloyd D. George in June of 1992 when he first attempted to force the City to trial in the federal Court against its will.

Prior thereto, the City had added defensive pleas of "Res Judicata" and "collateral estoppel" to its continuing plea of "lack of subject matter jurisdiction." At that time, Judge Lloyd D. George must have become aware of the Eleventh Amendment impasse which arose out of the City's Huffman abstention challenge; i.e. that the City Council's quasi-judicial order of revocation had been "stayed" by his injunction order, and had not become final and, therefore, such pleas of "res judicata" and "collateral estoppel," though pleaded, would not be available to the City as a defense in the federal trial; for, at that time, and, on his own motion, he reversed his initial ruling, suspended the trial procedure and, thereafter, certified the matter for an interlocutory appeal to the Ninth Circuit. See Statement of Facts in the Petition herein at pp. 22 and 23.

The "impasse" which was created by such federal injunction order was also

brought to Nevada Entertainment's attention after U.S. District Court Judge Lloyd George filed his final judgment on November 27, 1992 (see copy in Appellants Excerpts of Record, at Exhibit 7). At that time, Nevada Entertainment filed a petition for rehearing with the City Council, which must be interpreted as a recognition and judgment on its part that the matter was still "pending" before the City Council because the federal court's temporary restraining order and preliminary injunction order which it served on the City had indefinitely extended the stay which it had obtained from the City Council to allow it to take a "proper" appeal. However, the City Council could not act on the matter because the trial court's injunction, which U.S. District Court Judge Lloyd George had lifted, was immediately continued -- this time at the request of Nevada Entertainment and at the instance of the Ninth Circuit Court of Appeals -- and has not yet been lifted. The Parties

by stipulation, have stayed the mandate to await this Court's ruling on this matter, including the City's right to recover attorney's fees as a prevailing defendant under the Dayton Christian Schools case and 42 U.S.C. Section 1988, and damages under the injunction bond which the United States District Court set when the federal court's injunction was placed in effect. (See Statement of Facts in the Petition herein at p. 28).

The trial facts clearly establish that Nevada Entertainment's Attorney did not (as it might have done) wait until May 2, 1990 to file its federal lawsuit, on which date the City Council's 10 day stay order would have lapsed, and the City Council's revocation order would then have "become" final. Such a fact situation (not here present)[1] would have presented a

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[1] For an example of an attempt to state such a case (not here present), see (Footnote Continued)

different case and controversy and different federal questions as to whether, in such cases, a federal plaintiff could show, by extinsic evidence that the Huffman abstention doctrine did not apply because he was bringing a new and independent case in the U.S. District Court, and

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(Footnote Continued)
the petition for writ of certiorari in Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., No. 94-786 which was docketed on October 7, 1994, and served on the City of Henderson by mail on October 29, 1994. Because the petition herein establishes that the Eleventh Amendment does not permit Nevada Entertainment to file a federal lawsuit under the historical facts set forth herein in Case No. 94-662, the City of Henderson considers the filing of Case No. 94-786 to be a "frivolous" filing, and has addressed that issue in the Supplemental Brief which is being filed concurrently with the Reply Brief herein (case No. 94-662) and will further address that issue and Nevada Entertainment's untrue Statement in this Petition at p. 7, reading:

> "The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion."

in a Response Brief and Cross-Petition in Case No. 94-786. See, also, Statement of Facts in the petition herein in No. 94-662 at pages 38-39.

had abandoned the litigation in his state case, and was willing thereby to accept and suffer the potential risk of defeat under a "res judicata" and "collateral estoppel" defense.

Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the

City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish "standing" at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.

The duty of a Respondent to respond in a brief in opposition to a Petition for Writ of Certiorari is set forth in Rule 15.1 as follows:

> "Brief in Opposition.
> "...the brief in opposition should address any perceived misstatements of fact of law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition."

Further, Rule 16.1 provides that, after consideration of the papers, the Court may make a summary disposition of the merits. Because the record on appeal herein is clear that this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) is a binding precedent and controls the disposition of this case [which the Ninth Circuit so held in its first opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)], see Statement of Facts in the Petition herein at pp. 38-39, this Court is presently empowered to grant summary relief to

Petitioner without setting the issue for oral argument. See Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, Seventh Edition at pp. 250 et seq., "(c) Summary Disposition of the Merits by Per Curiam Opinion." Petitioner submits that such a disposition would not be proper in this case because of the preeminent importance of the City of Henderson's additional claims of: (1) Eleventh Amendment injury and (2) the federal court's lack of subject matter jurisdiction, both of which are of national interest to all of the states.

Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copies at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the

States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., Case No. 94-786. Further, there is a continuing problem in the Ninth Circuit and other Circuits, with the correct application of the test to be applied in ruling on Huffman abstention challenges, and a serious need for a comprehensive opinion of this Court to settle the present abstention problem and controversy in the Ninth Circuit; that is, the divergent views of the 38 individual Ninth Circuit Court judges, and a refusal of some: (1) to "recognize" the Eleventh Amendment foundation of the Huffman abstention challenge, and (2) to defer in proper cases to the sovereign right of state courts to rule on important State interests under the Eleventh Amendment. This issue is further addressed in a Supplemental Brief in Case No. 94-662 and in the City's

Cross-Petition to Nevada Entertainment in Case No. 94-786, concurrently being filed.

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.

Petitioner cannot envision a "riper" "test case" in which to examine the merits of the City's claim that the refusal to apply Huffman abstention doctrine is the direct cause of the City's Eleventh Amendment injury. The Statement of Facts clearly documents: (1) a refusal of the U.S. District Court and the Ninth Circuit Court of Appeals to apply the "binding" rule of law established by this Court in its Huffman and Dayton Christian Schools abstention decisions; (2) judgments of both Courts which contravene the State of Nevada's rights under the Eleventh Amendment; and (3) Eleventh Amendment constitutional injury to the City of Henderson and the State of Nevada which is patent on the face of the record.

Dated: November 26, 1994

James J. Clancy

APPENDIX 1

STATEMENT OF FACTS IN PETITIONER'S SUPPLEMENTAL BRIEF IN NO. 92-643, AT PAGES 4-12.

[Refer: pp. 5 & 15 of Reply Memorandum.]

Text at page 5 reads:

"At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief)."

Text at page 15 reads:

"Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

"Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)."

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much." (Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

APPENDIX 2

COPY OF FEDERAL COMPLAINT

[Reference: pages 6 and 7 of Reply Memorandum.]

Text at pages 6-7 reads:

"As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still 'pending' up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day 'stay' period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring 'subject matter jurisdiction' on such date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief."

ROGER JON DIAMOND
2115 Main Street
Santa Monica, CA 90405

(213) 399-3259

State Bar No. 40146

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs, vs. CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants.	CV No. CV-S-90-264-LDG-LRL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. FILED: APRIL 24, 1990

Plaintiffs, Nevada Entertainment Industries, Inc. and Daniel Bishop allege as follows:

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983 in that this is an action by

Plaintiffs with regard to their attempt to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution; they are seeking to enjoin the Defendants from closing their constitutionally protected business.

2. Venue lies in the Southern Division of the District of Nevada; the City of Henderson is located in Clark County, Nevada, which is within the jurisdiction of the Southern Division.

3. Plaintiff Nevada Entertainment Industries, Inc., is, and at all times mentioned herein, was a corporation duly authorized and created by the laws of the State of Nevada. Plaintiff Daniel Bishop at all times mentioned herein, was and is the President of Nevada Entertainment Industries, Inc. and would be subject to criminal sanctions should Defendants not be enjoined from closing the subject business.

4. Defendant City of Henderson was and is, at all times mentioned herein, a

municipal corporation duly created by the laws of the State of Nevada and was and is located within Clark County and the Southern Division of the District of Nevada.

5. Defendant James Goff is sued in his official capacity as Chief of Police of the City of Henderson.

6. This action relates to the attempt by Plaintiffs to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution. The business is known is Fantasy Video Plus and is located at 1100 North Boulder Highway, Henderson, Nevada.

7. Defendants contend that the business in question (Fantasy Video Plus), is an adult business within the meaning of Henderson Municipal Code §19.16.006(B). For the purpose of this lawsuit, Plaintiffs will concede that the subject business, Fantasy Video Plus, is an adult business within the meaning of §19.16.006(B) of the Henderson Municipal Code.

8. On February 17, 1989, Plaintiffs

desired to commence a business in the City of Henderson wherein books, magazines and novelties would be sold and motion picture films (video tapes) could be sold and/or rented and exhibited. Plaintiffs desired, with respect to such business, to sell, rent, and exhibit materials protected by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs located a parcel of property at 1100 North Boulder Highway, Henderson, Nevada. On February 17, 1989, Plaintiffs entered into a five year lease for the premises at 1100 North Boulder Highway, Henderson, Nevada 89015. The premises consisted of a structure with 3,200 square feet of floor area. The lease would commence on April 1, 1989 and last until April 1, 1994.

10. At the time the lease was made, the City of Henderson had already enacted (May 1983), Chapter 4.102 of the Henderson Municipal Code regarding "video rental stores."

11. Henderson Municipal Code §4.102.020 required all "video rental stores" (defined as establishments which derived its gross profits from the sale or rental of sexually explicit movies, films or tapes) to certify that no such films would be sold or leased to persons under the age of 21.

12. With the exception of Chapter 4.102, Defendant City of Henderson did not further regulate premises selling or renting "adult films."

13. It was the intention of Plaintiffs to exhibit, sell, and/or rent the kinds of materials described in Chapter 4.102 of the Henderson Municipal Code (video rental stores).

14. The general requirements for obtaining a business license were set forth in Title 4 of the Henderson Municipal Code entitled "Business Regulations and License."

15. On March 7, 1989, after Plaintiffs executed their lease on February 17, 1989, Defendant City of Henderson adopted

Ordinance No. 1112 which repealed in its entirety former Chapter 4.04 entitled "Business Regulations and Licenses" and which replaced it with a new Chapter 4.04 entitled "Business Regulations and Licenses."

16. Accordingly, since the adoption of Ordinance No. 1112 on March 7, 1989, Defendant City of Henderson has been regulating businesses and has been determining whether or not to issue business licenses based upon the provisions of the new Chapter 4.04 which was adopted by Ordinance No. 1112.

17. By virtue of Henderson Municipal Code §4.04.020, all businesses in the City of Henderson must have a license issued by the City of Henderson.

18. Henderson Municipal Code §4.04.020 provides as follows:

> "(a) It shall be unlawful for any person to commence, carry on, engage in or continue in the City any business without first

obtaining a license and paying the appropriate license tax as provided by terms and provisions of this Title.

(b) A license shall only be issued if the applicant has a fixed place of business from which the business will be conducted, unless the Title specifically states otherwise. Once issued a license, the licensee shall not engage in business from any other premises other than the one for which the license was issued.

(c) No licensee shall allow another person to display a license on the licensee's premises, or to in any way allow any other person to use the licensee's premises to conduct business unless expressly permitted by the Division.

(d) Upon the filing of a

complete and accurate business license application and the payment of all required license fees, the applicant may be issued a temporary business license by the Division; provided, however, that the requirements of all appropriate federal, state, and county regulatory agencies have been met; and that the requirements of all Departments or Divisions of the City have been meet and properly approved. The temporary business license shall permit the applicant to engage in the business designated at the location so stated for a period of up to, but not to exceed sixty (60) days, within which all inspections and requirements imposed upon the applicant by the various Departments or Divisions of the City are to be complied with.

Upon the recommendation by the various Departments or Divisions within the City, the Division shall have the discretion to extend a temporary business license for a period of an additional sixty (60) days. It shall be the sole responsibility of the applicant to schedule all follow-up inspections necessary to comply with all the requirements and corrections. Should the applicant have not met the requirements as set forth by the Departments or Divisions of the City within the maximum prescribed time limit of one hundred twenty (120) days, the temporary license shall be deemed expired. Continued operation of the business shall constitute a violation of this Title, and the business shall be subject to legal action as prescribed by

this Title, the penalties for which are described in Section 4.04.230.

(e) The above stated provisions for a temporary business license shall be in addition to those provisions applying to privileged business licenses or any business which requires formal approval by the Council, unless the Director has first given tentative approval in accordance with section 4.04.170.

19. Henderson Municipal Code Section 4.04.150 sets forth the grounds for denial, non renewal, suspension, limitation and revocation of licenses. Specifically, Section 4.04.150 provides as follows:

"It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of

this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this title.

(a) Any license or permit application made pursuant to the provisions of this title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information required by this Title;

(2) All license and investigation fees are not paid;

(3) False or fraudulent statements

in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) The applicant, or any of its principals, do not qualify for, or have not obtained work card identification as may be required by the Division;

(6) A finding by the Division or by the Council that said business will not comport with the peace, health, safety, convenience, good

morals, or the general welfare of the public;

(7) Lack of fitness of the applicant to engage in the particular occupation of business. For the purpose of this section, lack of fitness shall be defined as that quality or character of the license applicant which tends to establish that the applicant will not perform the services to be provided under his license or permit in a reasonable manner to the public. Particular factors to be taken into consideration by the Division or by the Council in determining whether the applicant

is unfit, are whether the applicant has a bad moral character, has intemperate habits or a bad reputation for truth, honesty, or integrity, or has a prior criminal conviction and/or a prior license denial, suspension, limitation or revocation, either locally or in another state or community, to the extent that it is possible that the acts which formed the basis of the conviction, denial, suspension, limitation, or revocation may be committed by the applicant under the license or permit being

applied for. In the event the applicant is a company, partnership, association, corporation, or other business entity, the Division or the Council may consider the fitness of each of the applicant's owners, partners or directors.

(8) For any other cause by the City through its Division or Council to be a just or equitable reason.

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be limited to

the following:

(1) The conduct of the business in an unlawful, improper, or irregular manner;

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) The existence of unsanitary conditions at, near, or in the premises which causes or tends to create a public nuisance or which injuriously

affects the public health, safety or general welfare;

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) The commission of, or permitting or causing the commission of any act in the operation of the business which act is made unlawful or is prohibited by any ordinance of the City, county, state or federal government;

(7) For any other cause by the City through its Division or its Council to be a just or equitable reason.

(c) All business licenses issued under this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable."

20. Henderson Municipal Code § 4.04.200

authorizes certain Henderson officials to enforce the ordinance by citations and arrests. Those with enforcement powers include police officers as well as the Director of Licensing and his agents.

21. Henderson Municipal Code §4.04.220 provides that the violation of any provision of the Code is a misdemeanor.

22. Shortly after Defendant City of Henderson adopted Ordinance No. 1112, portions of which are quoted above, the City of Henderson also adopted Ordinance No. 1120, which enacted Titles 18 and 19 of the Henderson Municipal Code. Ordinance No. 1120 was a comprehensive revision of the Zoning Code and zoning law of the City of Henderson. On April 4, 1989, by Ordinance No. 1120, Defendant City of Henderson repealed its prior ordinances regarding zoning, and, as stated, replaced them with a new comprehensive "Development Code." Said Development Code purported to regulate zoning in the City of Henderson and still purports to regulate zoning in the City of

Henderson.

23. Prior to April 4, 1989, it was lawful for Plaintiffs to operate their proposed business at the property leased by them on February 17, 1989. That is, the property was commercial in nature and permitted the establishment of the business intended to be operated by Plaintiffs.

24. At the time Plaintiffs leased their property for the business in question, their property was zoned commercial (CC).

25. However, after the adoption of Ordinance No. 1120 on April 4, 1989, the City of Henderson purported to regulate where "adult businesses" could be located in the City of Henderson. That is, the effect of Ordinance No. 1120 adopted April 4, 1989, was to prevent Plaintiffs from commencing the business they intended to commence when they first leased the property on February 17, 1989.

26. Ordinance No. 1120 purported to allow adult businesses to exist only in one zone of the City of Henderson, the newly

created "CH" zone.

27. Section 19.16.006(B) of the Henderson Municipal Code provides as follows (Ordinance No. 1120):

> "Adult Businesses. Establishments based primarily on materials or performances that depict, describe, or relate to "specified sexual activities", as defined in Chapter 19.12."

28. Section 19.12.006(DE) of the Henderson Municipal Code provides as follows:

> "Sexual Activities, Specified: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, oral copulation, or sodomy; fondling or other erotic touching of human genitals (pubic region) buttocks, or female breasts."

29. Section 19.24.002 of the Henderson Municipal Code specifies the following with

respect to the "CH" Highway commercial district zone":

> "To provide sites for the auto-oriented commercial uses, including hotels, motels, service station, car washes, automobile sales and services, drive in restaurants, offices, limited warehousing and commercial services."

30. By virtue of Henderson Municipal Code §19.24.004, adult businesses, including bookstore and motion picture arcades, were and are only permitted in the "CH" zone and, within such zone, allowed only "with use permit, subject to location requirements set forth in Henderson Municipal Code Licensing Regulations."

31. After Defendant City of Henderson adopted its revised zoning law on April 4, 1989, no parcel of property in the City of Henderson was zoned "CH." Thus, nowhere in the City of Henderson could one lawfully operate an adult business, such as an adult

bookstore and arcade. Although the City of Henderson adopted the zoning provisions quoted above on April 4, 1989, the City did not establish any zone known as the CH zone. Thus, after April 4, 1989, the City of Henderson effectively prohibited adult bookstores and arcades from operating anywhere within the City of Henderson, in violation of the First and Fourteenth Amendments to the United States Constitution (Schad v. Borough of Mount Ephraim, 452 U.S. 61 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

32. Since the City of Henderson after April 4, 1989 effectively banned throughout its territory all adult bookstores and arcades by zoning ordinance, the zoning ordinance was a nullity, being unconstitutional on its face. In effect, the City of Henderson by violating the principles set forth by the United States Supreme Court in Schad v. Borough of Mount Ephraim, supra, had no zoning law regarding adult bookstores

and motion picture arcades.

33. Although, as stated above, Defendant City of Henderson totally prohibited adult bookstores and arcades from operating anywhere in the City of Henderson, in violation of the First and Fourteenth Amendments to he United States Constitution, Defendant City of Henderson also required that any such business obtain both a business license and a conditional use permit.

34. One may not obtain and/or retain a business license from Defendant City of Henderson if one's business is not zoned properly or if it does not have a required conditional use permit.

35. In addition to needing a business license as set forth above, Plaintiffs also needed a conditional use permit pursuant to Section 19.74.012 of the Henderson Municipal Code.

36. In order to obtain a conditional use permit, Plaintiffs would have to establish and the City Council would have to

find, among other things,

"That the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the Comprehensive Plan; will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City. . . ."

37. As stated above, after April 4, 1989, the City of Henderson was maintaining and did maintain an unconstitutional system with respect to adult bookstores and motion picture arcades in that, among other things, there was no property zoned CH and therefore no property on which such a business could be operated; in addition, even if there were such properties zoned CH, such business

would have to obtain a business license under the standards set forth above and also obtain a conditional use permit under the standards set forth above, such standards being unconstitutionally vague and unenforceable.

38. On August 31, 1989, Plaintiffs duly filed their application for business license. At the time Plaintiffs applied for their business license, they were informed by an official of the City of Henderson that there was no place in the City of Henderson were one could lawfully operate an adult bookstore and motion picture arcade. Therefore, if their application described the business as an adult business, Defendant City of Henderson would be compelled to deny the application.

39. On August 31, 1989, Plaintiffs submitted a written application on a form provided by the City of Henderson. Under the heading "General Information", Plaintiffs provided the following statement "Nevada Entertainment Industries dba Fantasy

Video Plus."

40. Under the heading "Occupancy Use Information" (type of business), Plaintiffs provided the following description:

"Mass media books and video store; novelty shop, etc."

41. On September 21, 1989, Defendant City of Henderson issued a revenue business license to Plaintiffs.

42. On or about December 5, 1989, Defendant City of Henderson re-zoned Plaintiffs' property at 1100 Boulder Highway, Henderson, NV from CC to CH. By rezoning Plaintiffs' property from CC to CH, Defendant City of Henderson determined that an adult bookstore and arcade could theoretically be operated at said location, thereby ostensibly eliminating one ground for invalidating the regulatory scheme for adult bookstores and arcades; that is, as of December 5, 1989, Defendant City of Henderson no longer purported to totally ban adult bookstores and arcades from the City of Henderson (thereby purporting to comply

with Schad v.Borough of Mount Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

43. However, although Defendant City of Henderson re-zoned Plaintiffs' property from CC to CH, Defendant City of Henderson still required a business license and a conditional use permit for the operation of an adult bookstore and motion picture arcade.

44. Defendant City of Henderson does not want any adult bookstores or motion picture arcades to be located anywhere within its territorial jurisdiction, but also does not want any court to invalidate its regulatory scheme. As a result, Defendant City of Henderson wants to create the impression that it allows such businesses when in fact it does not and does not want them.

45. On February 1, 1990, Plaintiffs opened their business and were immediately inspected by Defendant City of Henderson.

46. Defendant City of Henderson

concluded that Plaintiffs opened an adult bookstore and arcade. Because Defendant City of Henderson did not want such a business to operate anywhere within its City limits, Defendant City of Henderson took two actions to close Plaintiff's business. It introduced and, on March 13, 1990, adopted ordinance No. 1160, purporting to regulate "sexually oriented business."

47. Ordinance No. 1160 amended Title 4 of the Henderson Municipal Code by establishing Chapter 4.110. In essence, newly adopted Chapter 4.110, requires adult businesses (including Plaintiffs' business) to obtain a license; however, it would preclude a business such as Plaintiff's business from operating within 1000 feet of a place where alcoholic liquor is sold. Plaintiffs' business is within 1000 feet of a place where alcoholic liquor is sold but the ordinance creates a non conforming us for those businesses operating lawfully on March 15, 1990 (for a period of six months). Accordingly, while the adoption of Ordinance

No. 1160 reveals the obvious intent by the Defendant City of Henderson to shut down Plaintiffs' business, arguably Ordinance No.1160 has not yet affected Plaintiffs' business. There are other remedies provided by Ordinance No. 1160, and therefore the specific provisions of Ordinance No. 1160 will not be further discussed. Plaintiffs are not sure how the distance restriction will be determined and measured.

48. In addition to adopting Ordinance No. 1160, Defendant City of Henderson on March 13, 1990 initiated a proceeding to revoke Plaintiffs' business license.

49. Although Plaintiffs believe and still believe and contend that the ordinances of the City of Henderson purporting to regulate adult bookstores and arcades are facially invalid, out of an abundance of caution Plaintiffs decided to participate in an administrative proceeding provided by Defendant City of Henderson with respect to the revocation issue. The revocation hearing was conducted by the City

Council of the City of Henderson on April 10, 1990. After conducting the hearing, Defendant City of Henderson voted to revoke Plaintiffs' business license. At said hearing, Plaintiffs contended, unsuccessfully, that the regulatory scheme and the ordinances quoted above violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs objected to the revocation of their business license. The decision to revoke the license was arbitrary, invalid, and based upon incompetent and irrelevant evidence, and based upon an invalid ordinance. Plaintiffs made no material misrepresentations on their application. Had the information been presented which Defendant City of Henderson purportedly requested, it would not have been material to any valid criteria for granting or denying the license.

50. After the hearing conducted on April 10, 1990, Defendant City of Henderson purported to revoke Plaintiffs' business

license. A copy of the Decision and Order revoking the business license on April 16, 1990 is attached hereto as Exhibit 1.

51. The decision of April 16, 1990 takes effect on or about May 1, 1990.

52. Thus, as of May 1, 1990, unless this Court restrains the revocation or restrains enforcement of the ordinance, Plaintiffs will have to shut down their business. Plaintiffs contend that the business license ordinance and the conditional use permit ordinance are unconstitutional facially. Accordingly, it is probably not necessary for Plaintiffs to retain their business license. Instead, Plaintiffs have standing to challenge the facial validity of said ordinances.

53. Although unnecessary, Plaintiffs did exhaust available administrative remedies before the Henderson City Council.

54. Defendant James Goff was and is the Chief of Police of the City of Henderson. If Plaintiffs do not have a business license and/or conditional use

permit, Defendant James Goff, Chief of Police of the City of Henderson, will arrest, and/or cite Plaintiffs and their employees, in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs, accordingly, will be forced to close their business protected by the First and Fourteenth Amendments to the United States Constitution, unless this Court grants equitable relief as requested herein.

55. In addition to the Chief of Police, the Henderson Municipal Code also authorizes other City of Henderson officials to arrest and/or cite Plaintiffs. This would include the Director of Licensing, and agent and employee of Defendant City of Henderson.

56. Plaintiffs are without a legal remedy in the ordinary course of law. The threat of criminal enforcement of the Henderson Municipal Code against Plaintiffs by Defendants, is and will have a chilling affect on their First and Fourteenth

Amendment rights. They will be forced to close their business unless this Court grants a temporary restraining order, preliminary injunction, and permanent injunction.

57. Defendant City of Henderson has been since April 4, 1989, and still is, enforcing an unconstitutional regulatory scheme designed to preclude the operation of adult bookstores and motion picture arcades.

58. Plaintiffs business is located in the appropriate zone. If, in fact, it will become unlawful by virtue of Ordinance No. 1160 in six months, which Plaintiffs do not concede, then Defendant City of Henderson will also have unduly restricted the available locations wherein an adult business can be located, also in violation of the First and Fourteenth Amendments to the United States Constitution, but this particular challenge may be premature. If not, Plaintiffs are also attacking the constitutionality of Ordinance No. 1160 in this proceeding to the extent Defendants,

and each of them, attempt to enforce it.

59. Plaintiffs have been forced to retain an attorney to represent them in thisproceeding. If successful, Plaintiffs will pray for an award of attorney's fees pursuant to Title 28, United States Code, Section 1988.

60. A dispute has arisen among the parties with regard to the constitutionality of Ordinance Nos. 1112, 1120, and 1160 of the City of Henderson and actions taken by Defendant City of Henderson and threatened by Defendant City of Henderson and its Chief of Police. Accordingly, it is appropriate for this Court to render a declaratory judgment considering the constitutionality of various provisions and threatened actions and revocation proceedings of Defendants.

61. Unless this Court grants immediate relief, Plaintiffs will suffer irreparable injury in that they will be forced to close their business and be precluded from selling, renting, and exhibiting motion picture films, video tapes, and books and

magazines protected by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining Defendants, and each of them, from attempting to or from enforcing ordinances against Plaintiffs which would cause them to close their business at 1100 Boulder Highway, Henderson, NV;

2. For a temporary restraining order, preliminary injunction, permanent injunction, restraining Defendants and each of them, from revoking or enforcing the revocation of Plaintiffs' business license;

3. For declaratory judgment that Plaintiffs have the right to continue operating their business, as currently constituted, at 1100 Boulder Highway in Henderson, Nevada;

4. For declaratory judgment that

Defendant City of Henderson may not enforce its ordinances against Plaintiff's business at 1100 Boulder Highway, Henderson, Nevada;

5. For attorney's fees according to proof;

6. For such other and further relief as the court deems just and proper.

DATED: April 23, 1990

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Plaintiff

AFFIDAVIT OF DANIEL BISHOP

State of Nevada)
) SS
County of Clark)

Daniel Bishop, first being duly sworn, deposes and says:

1. I am the President of Nevada Entertainment Industries, Inc. and am also co-Plaintiff in this action. I have read the foregoing Complaint and the facts stated therein are true and correct to the best of my knowledge. If called upon as a witness, I could competently testify to such facts and I will be available for cross-examination by Defendants' counsel at the hearing on the request for temporary restraining order and at the hearing on the request for preliminary injunction.

DANIEL BISHOP

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK,

STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	)	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to operate as an adult video business, the

licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately

to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issues at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of

the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAFEN

_____
CARLTON LAWRENCE

_____
DOROTHY VODENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

COPY OF QUESTIONS I & IV IN PETITION FOR WRIT OF CERTIORARI IN NO. 92-643, AT pp. i-iii.

[Refer: page 9 of Reply Memorandum.]

Text at page 9 reads:

"A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have 'subject matter jurisdiction' on April 24, 1990, must, of necessity, follow from the 'command' of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that 'command' in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387(1941). See also Questions I & IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii, a copy of which is attached at Appendix 3 to this Brief."

Question I reads: "Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. Dist. Court has not found the "extraordinary circumstances" which the 11th Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie?"

Question IV reads: "Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Sec.1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

APPENDIX 4

COPY OF CITY OF LAS VEGAS V. NEVADA INDUSTRIES, INC., 772 P.2d 1275 (NEV. 1989). [Reference: page 18 of Reply Memorandum.]

Text at page 18 reads:

"Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries,Inc., 772 P.2d 1275 (Nev.1989), see copy at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., No. 94-786."

[CONTENTION: The City of Las Vegas case, supra, specifically held one year earlier (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business license by deception may not obtain the judicial relief Nevada Entertainment seeks (in Questions 1-3 of its Petition for Writ of Certiorari in 94-786) in the quasi-judicial proceedings which are brought by the State to revoke its license for fraud in its business application.]

Question 1 reads: "May a city violate the first and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtianed its business license by deception?" Question 3 reads: "To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 is frivolous because the federal court below lacked subject matter jurisdiction under the 11th Amendment violation.

SUPREME COURT OF

NEVADA

CITY OF LAS VEGAS, Nevada, Appellant, v. NEVADA INDUSTRIES, INC., a Nevada Corporation, Respondent.	CASE NO. 18491 OPINION. DATED: April 25, 1989

Business challenged city's revocation of its business licenses. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., issued permanent injunction and writ of mandamus prohibiting enforcement of business license ordinances against business, and city appealed. The Supreme Court, Young, C.J., held that: (1) misrepresentation in license applications that business was not sexually oriented justified revocation of licenses, and (2) ordinance provision serving as basis for imposition of fine against business was invalid.

Affirmed in part and reversed in part.

1. Licenses:

Falsely representing on applications for business licenses that business was not sexually oriented justified city's revocation of business licenses pursuant to municipal code, irrespective of any First Amendment interests. U.S.C.A. Const.Amend. 1.

2. Municipal Corporations:

While municipalities generally enjoy power to enforce their ordinances using fines, such ordinances must fix valid maximum penalty.

3. Municipal Corporations:

Standardless ordinance invites discriminatory enforcement.

4. Licenses:

Municipal Code provision authorizing imposition of penalty upon business, determined to have misrepresented its status as sexually

oriented business in application for business licenses, was invalid, as it vested city officials with unlimited discretion to establish fines and posed great risk of excessive fines. Const. Art. 1, §6.

5. Licenses:

Municipal Corporations:

Portions of penalty provision of municipal business license ordinances determined to be invalid for failing to establish valid maximum fine could be severed without defeating objectives of ordinance and, therefore, validity of remaining portions of ordinance would be sustained. Const. Art. 1, §6.

George F. Ogilvie, City Atty., Robert Yeargin and Val Steed, Deputy City Attys., Las Vegas, for appellant.

Alan B. Andrews, Las Vegas, For respondent.

OPINION

YOUNG, Chief Justice.

This action arose out of the appellant Las Vegas City Council's (Las Vegas) decision to revoke respondent Nevada Industries' business licenses. Nevada Industries operates a lounge facility with a jacuzzi and meeting rooms. A detective observed nudity and the exposure and touching of female breasts during a visit to the facility.

After an investigation and a hearing, Las Vegas revoked the business licenses because it found that Nevada Industries is a sexually oriented business, i.e. a "nude show." Consequently, it found that respondent made a misrepresentation on its application for business licenses by stating that it would not operate a sexually oriented business.[1] Moreover, Las Vegas found that Nevada Industries violated a Las Vegas zoning ordinance prohibiting the establishment of a sexually oriented business within one thousand feet of another sexually oriented business, church, school, park or playground.[2] Las Vegas also found

that Nevada Industries violated ordinances concerning the keeping of business records and failed to properly maintain its State Industrial Insurance System (SIIS) coverage. Pursuant to these findings, Las Vegas revoked Nevada Industries' business licenses and fined respondent $50,000.[3]

On Nevada Industries' motion, the district court issued a writ of mandamus and reviewed Las Vegas' actions. The district court concluded that Nevada Industries' activities enjoyed First Amendment protection because Las Vegas sought to regulate them as a "nude show." The court found the applicable ordinances unconstitutional as applied to this protected activity, and issued a permanent injunction and a writ of mandamus prohibiting their enforcement against Nevada Industries. Las Vegas appeals from the district court's judgment.

[1] Las Vegas' finding that Nevada Industries' activities constituted a nude show provided the basis for its conclusion

that Nevada Industries made misrepresentations on its application for a business license, and for its finding that Nevada Industries violated Las Vegas' zoning ordinance by operating within one thousand feet of another sexually oriented business. LVMC §19.74.020(I) addresses sexually oriented businesses, and defines "nude show" as "any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or as an attraction for business." The provision also defines adult motion picture theaters, adult bookstores, and similar establishments as sexually oriented businesses. Las Vegas correctly points out that the sucking of a woman's breast by a man, as observed by one of its detectives, constitutes "sexual conduct" under LVMC §19.74.010(A)(1) as do other actions which the detective observed.

Nevada Industries' facilities and advertising support the conclusion that it intended to operate in its present manner

(i.e. as a sexually oriented business) at the time it applied for its business license. Therefore, the record demonstrates that Nevada Industries falsely represented on its license application that it was not a sexually oriented business.

Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code.

Because Las Vegas determined that Nevada Industries' operation included a "nude show," the district court held that this case must turn upon First Amendment principles. According to the United States Supreme Court, under some circumstances,

nude dancing might be entitled to First and Fourteenth Amendment protection. California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). Thus, the district court concluded that Las Vegas' licensing procedures must meed the strict constitutional standards imposed on all statutes which impinge upon First Amendment rights. We disagree.

Las Vegas characterized the entertainment provided by Nevada Industries as "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case.

We note that under our decision in this case, Nevada Industries remains free to reapply for new business licenses. However,

should they continue to operate as a sexually oriented business, Las Vegas Municipal Code section 19.74.030 provides a basis for denying their licenses.

Accordingly, we reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business licenses. However, we affirm the district court insofar as it enjoined the imposition of Las Vegas' $50,000 fine upon respondent.

[2-5] According to Las Vegas Municipal Code section 6.88.120, after a hearing on a dispute, the board of commissioners shall render a decision on the merits, including "the penalty to be imposed, if any." After concluding that Nevada Industries violated Las Vegas' business licensing ordinances, the board of commissioners fined respondents $50,000.

Generally, municipalities enjoy the power to enforce their ordinances using fines. Commonwealth v. Cabell, 199

Pa.Super. 513, 185 A.2d 611, 616 (1962). However, the ordinance must fix a valid maximum penalty. Verona v. Shalit, 96 N.J.Super. 20, 232 A.2d 431, 433 (App.Div.1967). Because the penalty provision of section 6.88.120 fails to provide any limitation on the fines imposed, that clause is void. Id.

Municipal ordinances must not be oppressive. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 340 (1956). In its present form, section 66.88.120 is invalid because it vests Las Vegas officials with unlimited discretion to establish fines. A standardless ordinance invites discriminatory enforcement. Baer v. City of Wauwatosa, 716 F.2d 1117, 1124 (7th Cir.1983). Because of the great risk of excessive fines resulting from enforcement of the penalty provision, it cannot stand.[1] Nev. Const. art. 1, §6.

When invalid provisions of a municipal ordinance are severable without defeating the objectives of the ordinance, we sustain

and give effect to valid portions of the ordinance.[5] City of Portland v. Dollarhide, 71 Or.App. 289, 692 P.2d 162, 167 (1984). Accordingly, we sustain the validity of the remaining portions of section 6.88.120.

Therefore, we affirm the judgment of the district court insofar as it enjoins the imposition of Las Vegas' fine on Nevada Industries, and reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business license.[6]

STEFFEN, SPRINGER and MOWBRAY, JJ., concur.

1/ Las Vegas Municipal Code §6.02.330 provides in part:

> 6.02.330 **Disciplinary action-Good cause designated.** The licensee may be subject to disciplinary action by the Board of Commissioners for good cause, which may include, but is not limited to:
>
> (A) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information required in the application;

(B) The licensee or any of its principals fails to satisfy any qualification or requirement imposed by this Code, or other local, State or Federal Law or regulation pertaining to the particular license or approval for suitability sought or held;

. . . .

(F) The licensee or any of its principals has committed acts which would constitute a crime involving moral turpitude, or involving any Federal, State or local law or regulation relating to the same or a similar business;

(G) When substantial information exists which tends to show that the licensee or any of its principals is dishonest or corrupt;

. . . .

(I) The actual business activity constitutes a public or private nuisance, or will be or is conducted in an unlawful, illegal or improper manner;

. . . .

2/ In Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a zoning ordinance similar to that implemented by Las Vegas in this case. The Court noted that the mere fact that commercial exploitation of material arguably protected by the First Amendment is subject to zoning and other licensing criteria is an insufficient reason for invalidating these ordinances. Id. at 62, 96 S.Ct. at 2448. Moreover, we must give great respect to Las Vegas' interest in preserving the quality of urban life and to

2/ Cont.
its need to experiment with solutions to difficult problems. Id. at 71, 96 S.Ct. at 2452-53. Thus, we find that the zoning ordinance implicated in this case is constitutional.

3/ The City imposed the fine pursuant to Las Vegas Municipal Code §6.88.120 which provides that:

> 6.88.120 Decision by Board. After the hearing of a contested matter, the Board of Commissioners shall render a decision on the merits which shall include findings of fact and conclusions of law and the penalty to be imposed, if any, and shall thereafter make and enter its order in its minutes in conformity to such decision. The decision of the Board shall be served on the parties personally or shall be sent to them by registered or certified mail. The decision shall become and remain effective upon such service unless the Board shall otherwise order.

4/ According to NRS 193.170, whenever a statute prohibits the performance of any act but fails to impose a penalty for the violation thereof, commission of the act shall be a misdemeanor.

5/ We note that the vague penalties referred to in section 6.88.120 can easily be clarified by amendment.

6/ The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

APPENDIX B

PORTION OF TEXT OF PETITION FOR WRIT OF CERTIORARI, FILED IN CONNECTION WITH CASE NO. 92-643, AT POINT III ON PAGES 46-57 ["THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED."]

[Reference: Respondents' Brief in Opposition at 46-57.]

APPENDIX B

PORTION OF TEXT OF PETITION FOR WRIT OF CERTIORARI, FILED IN CONNECTION WITH CASE NO. 72-643, AT POINT III ON PAGES 46-47 [THE TEST IN WATSON V. BUSH IS CONTROLLING AND MUST BE APPLIED.]

[Reference: Respondents' Brief in Opposition at 45-47.]

license revocation proceeding is barred.

III
THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED.

In Watson v. Buck, 313 U.S. 387 (1941), the U.S. District Court for the Northern District of Florida had enjoined a Florida State containing a severability clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, this Court held at pages 401-402 that a state statute which contains a severability clause must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort mights be made to apply it ... " before a federal court can interfere with the right of the state court to interpret such legislation.

In such a case it is reversible error for a federal court to grant an injunction and preempt the state court from its func-

tion, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights...." Further, under Watson v. Buck, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." Otherwise, the defenses must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the United States Supreme Court of federal questions. It is patent upon the face of the record below that the Watson v. Buck requirements of "irreparable loss"..."both great and immediate" have not been established.

(1) A NUMBER OF IMPORTANT STATE INTERESTS ARE INVOLVED

This federal case has impaired a number of important and compelling state interests and rights of the City of Henderson:

(1) The exercise of Home Rule

powers; i.e. to ensure that the license issuing and zoning process is kept free from the perpetration of material fraud by individual license and zoning applicants;

(2) The administration of state laws, to obtain compliance with the precise standards embodied in those laws, and to conduct the state enforcement process free from unwarranted federal interference which disrupts municipal efforts;

(3) The right not to have newly-enacted comprehensive municipal zoning ordinances subjected to federal judicial review to protect the legitimate interests which underlie state laws, <u>until after</u> the state court system has been given an adequate opportunity to review and interpret said laws and the issues are ripe for adjudication;

(4) To practice judicial economy by requiring that litigation involving the above judicial functions be conduc-

ted in the most efficient forum (i.e. the State Court);

(5) A quick, definitive determination of matters involving the operation of a business without a license. Such an activity constitutes a "per se" public nuisance and "per se" irreparable harm which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083.

(6) Suppression of fraud in the governmental license application process. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, infra, at p. 41-42. It is contrary to established public policy to obstruct state enforcement action against applicants who deliberately make false statements to the government in a business application in order to obtain a license.

(7) Control of the issuance and revocation of revenue-based business licenses, as part of a local revenue collection (taxation) scheme.

Unless effective, summary relief is accorded cities against such unlawful "collateral" appeals by this Court exercising its corrective power under the All Writs Act, the City of Henderson will sustain the same type of irreparable harm as that suffered by the state of Ohio in the Huffman case, and by other cities in similar cases, where important state laws are prevented from being presented to the state appeals courts and this Court for an authoritative construction of state law under the federal Constitution[7].

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[7] Because of the federal court interference with state appellate proceedings, in Huffman, the substantive appellate question involving application of state law (re "closure" of a public nuisance) was never decided, and could never be presented to this Court for definitive review. Huffman involved the power of a state court to close a 100% continuing public nuisance (obscenity) [utilizing a remedial approach acceptable under Red Light Abatement statutes, where the object is the reformation of property used to conduct a per se public nuisance (prostitution)]. Because a final state determination on this important legal issue, regarding the scope of available state remedies, was collaterally blocked by the federal courts in Huffman, an Ohio

(Footnote Continued)

(Footnote Continued)

appellate determination on "closure" was unavailable as a precedent for the state of Ohio and for other state court systems, and the substantive legal issue could not be reviewed by this Court, leaving the "closure" issue, to date, unsettled across the Nation.

The question of the extent to which the states may exercise the remedy of "closure" in connection with the exercise of their police power has arisen in other state cases, with varying results. See State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc. et al., 102 Idaho 451 (1982), jur. noted 454 U.S.1140 (1982), and app. dismissed 455 U.S. 1009 (1982), in which a unanimous State Supreme Court upheld the constitutionality of one-year closure provision and award of attorney fees against a pornographic bookstore. Compare, Jurisdictional Question #1 posed in the Petition for writ of certiorari in Cooper v. Mitchell Brothers Santa Ana Theater et al., No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90 (1981), and Jurisdictional Question #1 posed in Cooper v. Mitchell Bros. Santa Ana Theater et al., No. 82-345, October Term 1982, denied in 459 U.S. 944 (1982). Because the applicability of "closure" to the public nuisance abatement process involving pornographic outlets has never been answered by this Court, after a protracted, time-consuming and expensive abatement procedure in which it was demonstrated that the defendant Mitchell Brothers had engaged in the regular continuous exhibition of obscene films as a course of conduct continuing over a period of 10 years, the City of Santa Ana was forced to "throw in the towel" in 1987, and settled the controversy by paying defendants their attorney's fees and allowing their pornographic outlet to continue operations in Santa Ana.

(2) THE STATE COURT WITH A "DIRECT" ATTACK ON THE "PENDING" STATE ACTION PROVIDES A MORE EFFICIENT JUDICIAL FORUM FOR THE RESOLUTION OF DISPUTES THAN THE "COLLATERAL" CHALLENGES BEING ASSERTED IN THE FEDERAL COURT AGAINST THE STATE STATUTES AND CITY ORDINANCES IN SUCH "PENDING" CASES.

The exercise of federal jurisdiction striking a state statute or ordinance is not proper, except where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it." Watson v. Buck, 393 U.S. 387 (1941).

Without doubt, the U.S. District Court has jurisdiction in the instant case to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional and a state court action is pending, under Middlesex County Ethics

Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task routinely performed by state court.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that

> courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and do not function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

"The cardinal principle of statutory

construction is to save and not destroy."

In examining the record of this case, it is apparent that the state system is the most efficient and proper forum for interpreting the interplay of the state statutes and municipal ordinances involved. Were the constitutionality of the "conditional use" zoning laws an issue[8],

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[8] The constitutionality of the conditional use in the CH zone is not yet in issue, inasmuch as the federal plaintiffs never applied for a variance or a special use permit. Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (CA9, 1988); Ill. Commerce Comm'n v. Thompson, 318 U.S. 675, and National Bank v. Bd. of County Commissioners, 264 U.S. 450 (1924). When the conditional use ordinance is properly made an issue, the construction to be given the newly enacted legislation is one for the Nevada Courts, not the U.S. District Court. See Watson v. Buck, supra, discussed at pages 46 - 47, herein, and U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971) and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. Compare, in this regard, the construction given by California Courts to People v. Library One, Inc., 229 Cal.App.3d 873 (1989), and Thomas v. County of Los Angeles, 232 Cal.App.3d 916 (1991), re the effect of this Court's ruling in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) on specific time limits during which decision is required on permit applications, and note, in this regard, that the issue here is license revocation, not license procurement.

there is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied, and only a state court has both the right and duty to give the same a constitutional interpretation. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [4th Cir. 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S. Court of Appeals for further consideration in light of FW/PBS, 493 U.S. 215 (1990)].

The question as to whether a state statute is severable is more properly a matter for the state court. In a statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court

upholding the ordinance as being constitutional on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding the fact that this Court held the ordinance to be unconstitutional on its face[9]. See in this regard, Associate Justice White's opinion in Metromedia, Inc., announcing the judgment of the Court, at 521, fn. 26, wherein he addresses the issue of severability and the right of state courts in that regard.

IV

FEDERAL PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN THAT THEY HAVE FAILED TO PLEAD AND PROVE WHY THE PRINCIPLES ESPOUSED IN WATSON V. BUCK AND HUFFMAN V. PURSUE, LTD. DO NOT CONTROL SO AS TO REQUIRE A DISMISSAL FOR LACK OF FEDERAL JURISDICTION.

Under the rationale expressed in Allen

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[9] Unlike the "Humpty-Dumpty" approach of the federal court system (which cannot construe a state law), the superiority of the state forum is self-evident where the "egg" can immediately be put back together again.

APPENDIX C

HENDERSON NEWS ARTICLES REPORTING UPON CRIMINAL ACTS (TWO MURDERS) UPON THE PREMISES INVOLVED.

[Reference: Respondents' Brief in Opposition at 51.]

Clerk found murdered in porn viewing booth

4/16/90

By Katherine E. Scott
News Staff Writer

A 22-year-old night clerk at Fantasy Video Plus was found shot to death inside a viewing booth early Sunday morning following an apparent robbery, according to the Henderson Police Department.

Denver Duane Turner was shot three times in the back of the head with a .22 caliber weapon, the Clark County Coroner's Office reported Monday. Police said Turner was last known to have been alive when his roommate spoke with him about 1 a.m. Sunday.

Police were called around 5:20 a.m. by a customer who found Turner's body at the back of the adult-oriented novelty store, HPD Detective Richard Perkins said Sunday at the scene. He said money was missing from the store.

"A security video tape is being reviewed as part of the investigation," police stated in a press release. Police are asking any persons with information to contact investigators at 565-2031 or 565-2004, the detective bureau at 565-2009 or the police department at 565-8933.

Police said Turner's body was found in a viewing booth in the southeast section of the Boulder Highway store. The door to the booth was open when the customer—a man in his 40s—found the victim.

Police said store management locked the business Sunday morning, with plans to open the following day. An electronic reader board in front of the store said the business would be closed until noon Monday, with no late fees to be charged.

That was believed to be the first time the store has closed its doors since opening on Feb. 1. The city of Henderson revoked the company's business license April 10 due to alleged misrepresentations in the application process, but the store has remained open pending a lawsuit filed April 24 in U.S. District Court.

Henderson Assistant City Attorney Liza Conroy said last month that the city is attempting to have the action moved to Clark County District Court because it believes licensing is the issue. Fantasy Video spokespersons have said their constitutional rights are being denied by the city, and that the case should remain in federal court.

Fantasy Video murder suspects caught in Oregon

11/14/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a Henderson porn store clerk are being held in Oregon pending extradition to face charges here, according to the Henderson Police Department.

Police said Amber Lynn Adams and Lance Matthew Reberger were apprehended in Coos Bay, Ore. on Friday morning, after local police entered them as suspects in the National Crime Information Computer.

They are suspected of shooting 22-year-old Denver Duane Turner early Nov. 4 as he worked in Fantasy Video Plus, an adult-oriented novelty store located on Boulder Highway.

The victim was shot three times in the back of the head, according to the Clark County Coroner's Office. Police said his body was found in a viewing booth in the back of the store by a customer who entered the store shortly after 5 a.m.

A police investigation found evidence implicating Adams and Reberger, providing enough information for them to be placed in the NCIC system, police said. Adams was also known with the surname Harvey, police said.

No cash taken in robbery at Fantasy Video

7/24/90

No cash was taken in an armed robbery at Fantasy Video last week, according to the Henderson Police Dept.

Police said a young, blond man took less than $100 worth of sexual aids from a clerk at the Boulder Highway store about 4:25 a.m. Thursday. A small caliber chrome automatic pistol was used, according to police.

"A security camera was operating at the time and the suspect was photographed," HPD Assistant Chief Kip Botkin said Monday. He added that police detectives are investigating the incident.

Murder suspects to fight extradition

11/15/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a clerk at Fantasy Video Plus, who Henderson Police said had first agreed to waive extradition from Oregon, instead said they would fight extradition when they appeared before a judge Tuesday in Coos Bay, Ore.

Amber Lynn Adams, 22, and Lance Matthew Reberger, 24, face charges of murder, robbery and burglary in the death of 22-year-old Denver Duane Turner at the adult-oriented novelty store on Boulder Highway. They were arrested Friday at a homeless shelter in the Oregon town, HPD Sgt. Ray Moser said in a telephone interview Tuesday.

HPD Detective Monty Sparks, who traveled to Oregon to investigate the case, said that "during the court appearance on Tuesday they requested council, and their extradition hearing was continued until Tuesday of next week."

Sparks said during a telephone interview Wednesday that the pair "were abusive and obnoxious during their court appearance, and totally disrespectful."

Moser said the two were identified as suspects following a tip which led investigators to several persons who provided enough evidence of their guilt that police were able to seek a warrant for their arrest.

He said a video surveillance tape police removed from the store had run out before the murder occurred. Turner was believed to have been killed approximately between 1 a.m. and 5 a.m. on Nov. 4.

Henderson police entered Adams and Reberger into the National Crime Information Computer on Thursday, Nov. 8, Moser said. He said police officers in Coos Bay recognized the couple from a recent child abuse report, and arrested them at the homeless shelter where they were staying.

Sparks said Oregon's Child Protective Services is caring for Adams' 3-year-old son. He said the child's natural father, who lives in Las Vegas, is seeking custody.

Police said Adams, also known with the surname Harvey, was from the Las Vegas area. Reberger was believed to be a transient who came here from Florida.

Fantasy Video murder suspect gets second preliminary hearing

5/16/91

By Katherine E. Scott
News Staff Writer

One defendant in last year's murder of a clerk at Fantasy Video Plus was scheduled recently for a second preliminary hearing in Las Vegas Justice Court on June 18.

Lance Matthew Reberger was to stand trial Monday in Clark County District Court on charges of murder, robbery and burglary. However, his case was remanded for a new preliminary hearing following a May 3 court appearance.

Defense attorney Phil Dunleavy said Wednesday that he was assigned the capital murder case after it had reached District Court for trial. "I didn't feel the man had

Murder suspect trial starts Monday

6/6/91

By Katherine E. Scott
News Staff Writer

Amber Lynn (Harvey) Adams, 22, is scheduled to stand trial Monday in Las Vegas District Court for the Nov. 4 murder of a local adult-oriented video and novelty store clerk.

Adams and 24-year-old Lance Matthew Reberger are charged with murder, robbery and burglary for the death of 22-year-old Denver Duane Turner inside Fantasy Video Plus last year. Reberger faces a June 18 preliminary hearing in Las Vegas Justice Court.

A motion to suppress evidence was denied last week, and Adams' court dates still stood as of presstime, according to court records. A calendar call is scheduled today.

Adams and Reberger were arrested on Nov. 9 in Coos Bay, Ore., after police there received a bulletin from Nevada that they were suspected in a murder here. Oregon officers recognized the couple from a child-neglect investigation a day earlier regarding Adams' young son.

Both waived extradition, and Adams also waived her preliminary hearing. She was later found competent to stand trial following a psychiatric evaluation ordered by Las Vegas District Court.

She was remanded to Justice Court for a March 18 preliminary hearing, then was bound over for a jury trial, scheduled to begin on Monday.

BEST AVAIL

Porn store robbed

1/19/94

Henderson police are seeking a gunman who robbed the Pure Pleasure adult book and video store on Boulder Highway Tuesday night.

"The clerk advised that a [man in] a mask, brandishing a shot

He fled on foot with an undisclosed amount of cash.

The suspect was wearing blue denim pants and a dark T-shirt, police said. Any person with information are asked to call the

ire Pleasure suspect nabbed

12/21/93

By Thomas Moore
News Staff Writer

nderson Police have arrested
n suspected of robbing the
Pleasure adult bookstore
e and is suspected of robbing
ilar store in Las Vegas.
uart Whiting, 22, of no known
ress was arrested last

Wednesday for the robberies which occurred on Dec. 14 and Nov. 26. He was arrested at Vo-Tech, where he was attempting to pick up his girlfriend.

Whiting was transported to the Henderson Jail and booked on two counts of armed robbery. He is being held on $60,000 bail.

Adult bookstore robbed once again

3/15/94

By Thomas Moore
News Staff Writer

An allegedly intoxicated robber was caught Sunday after stealing $12.95 in magazines and $7.50 in token coins from the Pure Pleasure Video and Bookstore on Boulder Highway at approximately 8:35 p.m.

According to a Henderson Police Department news release, Eugene Charles Lee, 32, of Henderson and a past customer, walked into the store and threatened to shoot the clerk if he did not give him some cash.

The clerk gave the man $12.95 in token coins and as the suspect walked out he grabbed a magazine. The police searched the surrounding area and found Lee drinking in a bar on Boulder Highway not far from the scene of the crime. He was arrested and taken to the Henderson Jail where he was booked on a charge of robbery.

ABLE COPY

Adult bookstore scene of slaying

5/3/94

By Thomas Moore
News Staff Writer

A Las Vegas man was shot in the chest early Friday morning outside the Pure Pleasure adult bookstore on Boulder Highway. He died later that morning during surgery at the University Medical Center.

According to a Henderson Police Department news release, Redentor Castillo Nicolas, 27, had been inside Pure Pleasure some time before 2 a.m. He left the store but then returned to the store to tell the clerk he had been shot and then collapsed onto the floor. The clerk called the police and paramedics. Nicolas was taken to UMC where he died at 5 a.m.

Police have videotape, taken from surveillance cameras in the store, that shows two possible suspects who were in the store shortly before the shooting.

The first suspect was described as a white male in his late 20s or early 30s standing about 5 feet, 9 inches tall, weighing from 160 to 180 pounds with sandy brown hair. He wore a dark colored baseball cap, a green camouflage jacket, blue jeans and light-colored tennis shoes.

The second suspect was in the same age range, but stood approximately 5 feet, 7 inches tall and weighed 150-160 pounds. He also had sandy brown hair and wore a dark-colored baseball cap and light-colored tennis shoes. However, this suspect was wearing a brown-colored camouflage jacket and bluish-grey short pants.

The two suspects drove away in a white vehicle. Anyone with information is asked to call Henderson Detective James White, 565-2031.

Arrests made in death

6/7/94

By Thomas Moore
News Staff Writer

Police have arrested two suspects in the April shooting death of a man outside the Pure Pleasure Adult bookstore.

Carl George Schulte, 25, of Henderson and Larry John Ledale Gomer, 22, of Chino, Calif., were arrested for the murder while already in the Henderson Jail for stealing a motor vehicle.

Redentor Castillo Nicolas was killed Friday, April 29, shortly after 2 a.m. after visiting the store. The police had surveillance tapes of some people who were in the store before the killing but were unable at the time to find the killer.

APPENDIX D

CITY ATTORNEY LETTER DATED NOVEMBER 17, 1994, REPORTING ON COSTS OF ABSTENTION LITIGATION TO DATE.

[Reference: Respondents' Brief in Opposition at 51.]

Adult bookstore scene of slaying

By Thomas Moore
News Staff Writer

A Las Vegas man was shot to death the early Friday morning outside the Pure Pleasure adult bookstore on Boulder Highway.

He died later that morning during surgery at the nearby Medical Center.

According to a Henderson Police Department news release, Roberto Castillo Nicolas, 27, had been inside Pure Pleasure some time before 2 a.m. He left the store but then returned to the store to tell the clerk he had been shot and then collapsed onto the floor. The clerk called the police and paramedics. Nicolas was taken to UMC where he died at 3 a.m.

Police have videotape, taken from surveillance cameras in the store, that shows two possible suspects who were in the store shortly before the shooting.

The first suspect was described as a white male, between the ages of 20s or 30s, 5 feet, 9 inches tall, weighing from 160 to 180 pounds with a ruddy complexion. He wore a dark colored baseball cap, a green camouflage jacket, blue jeans and light-colored tennis shoes.

The second suspect was in the same age range, but stood approximately 5 feet, 7 inches tall and weighed 150-160 pounds. He also had curly brown hair and wore a dark-colored baseball cap and light-colored tennis shoes. However, this suspect was wearing a brown-colored camouflage jacket and bluish grey sweatpants.

The two suspects drove away in a white vehicle. Anybody with information is asked to call Henderson Detective James White, 565-2031.

Arrests made in death

By Thomas Moore
News Staff Writer

Police have arrested two suspects in the April shooting death of a man outside the Pure Pleasure Adult bookstore.

Carl George Schultz, 25, of Henderson, and Larry John Lodzic Gruber, 22, of Chino, Calif., were arrested for the murder while already in the Henderson Jail for stealing a motor vehicle.

Roberto Castillo Nicolas was killed Friday, April 29, shortly after 2 a.m. after visiting the store. The police had surveillance tapes of some people who were in the store before the killing but were unable at the time to find the killer.

CITY OF HENDERSON
CITY HALL 240 WATER STREET 702/565-2323
HENDERSON, NEVADA 89015
Gateway to Lake Mead Resorts

November 17, 1994

James J. Clancy, Esq.
9055 LaTuna Canyon Road
Sun Valley, CA 91352

Re: Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

Dear Jim:

You have requested a compilation of costs incurred by the City to date in litigating the case of Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

I have compiled the attorney's fees and costs for outside counsel and estimated our in-house counsel time.

Outside counsel fees and costs are as follows:

1990-91	$41,530.02
1992	21,794.68
1993	24,161.20
1994	32,728.08
TOTAL	$120,213.98

The time estimates for in-house counsel in litigating the initial stages of the case and in later review and discussion of the ongoing litigation are set forth below. Since we do not keep track of hours on a per case basis, these estimates are true estimates derived by reviewing the files, documents and transcripts to arrive at an approximation of the time involved.

Based upon a reasonable billing amount in the legal community of $100 per hour, I arrived at the following values:

1990	80 Hrs.	$8,000.00
1991	45 Hrs.	4,500.00
1992	25 Hrs.	2,500.00
1993	25 Hrs.	2,500.00
1994	15 Hrs.	1,500.00
TOTAL		$11,000.00

Additionally, you requested copies of newspaper clippings concerning criminal activity at the subject premises which included two homicides. Attached to this letter are xerox copies of newspaper clippings from the Henderson Home News.

If you need any additional information, please do not hesitate to contact me.

Very truly yours,

Liza Conroy
Assistant City Attorney

LC/avm

Enclosures